82-1657

Office-Supreme Court, U.S.
FILED
APR 11 1983
ALEXANDER L. STEVAS, CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

CITY OF ALLEN PARK
Petitioner,

v

ECORSE POLLUTION ABATEMENT DRAIN NO. 2 DRAINAGE DISTRICT, a body corporate and CHARLES N. YOUNGBLOOD, Wayne County Drain Commissioner,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

IN A HIGHLY CONTROVERSIAL CASE INVOLVING A POTENTIAL MULTI-MILLION DOLLAR LIABILITY OF A MUNICIPALITY (PETITIONER HEREIN), ARE THE FOLLOWING ACTS OF THE TRIAL JUDGE, ALONE OR TAKEN TOGETHER, SUFFICIENT TO RAISE A QUESTION OF THE APPEARANCE OF PARTIALITY WITHIN 28 USC § 455(a) AS TO REQUIRE RECUSAL:

a) EXTRA JUDICIAL CONTACTS TO OBTAIN INFORMATION FROM OPPOSING COUNSEL;

b) EXTRA JUDICIAL CONTACT BY COURT WITH AN UNSPECIFIED NUMBER OF RESIDENTS OF PETITIONER MUNICIPALITY;

c) COURT SENDING LETTER AND ADVOCATIVE STATEMENT TO VARIOUS RESIDENTS WITH NO NOTICE TO COUNSEL;

d) STATEMENTS INDICATING COURT'S BELIEF THAT OPPOSING COUNSEL WOULD NEVER ALLOW COURT TO DO ANYTHING IT SHOULD NOT DO;

e) STATEMENT BY COURT THAT REAL PROBLEM WAS CALIBRE OF LEADERSHIP OF MUNICIPAL GOVERNMENT AND ITS OFFICIALS?

II.

DOES A RECUSAL MOTION UNDER 28 USC § 455(a) REQUIRE AN OBJECTIVE EVALUATION OF THE APPEARANCE OF PARTIALITY BASED ON A REASONABLE LOCAL OBSERVER AND IF SO, MAY THE COURT OF APPEALS DENY RECUSAL *DE NOVO* WHERE THE TRIAL JUDGE HIMSELF UTILIZED A SUBJECTIVE TEST AND WITHOUT ANY RECORD AS TO LOCAL STANDARDS, CUSTOMS, PRACTICES OR CONTROVERSIES?

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CITATION TO THE OPINIONS BELOW

The decision of the trial court was reported at 518 F. Supp. 1079 (1981). The decision of the Sixth Circuit Court of Appeals has not been reported as of the time of filing of this Petition.

JURISDICTION

The Judgment of the District Court for the Eastern District of Michigan, Southern Division, was entered on August 20, 1981 (A-29)*. The Sixth Circuit Court of Appeals affirmed the district court on November 15, 1982 (A-4), and the Sixth Circuit Court of Appeals denied a timely Petition for Rehearing and Rehearing *en banc* on January 11, 1983 (A-9). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves 28 U.S.C. § 455(a) which states:

> § 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy
>
> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

This appeal arises from an order dismissing the complaint for superintending control filed by the petitioner City of Allen Park alleging that the respondents had improperly apportioned the local share of costs for a project known as the Ecorse Creek Pollution Abatement Drain No. 2. This litigation was commenced in the Wayne County Circuit Court, Detroit, Michigan on January 8, 1981, but was removed by respondents to the United States District Court for the Eastern District of

* The symbol "A" refers to the Appendix attached hereto.

Michigan on February 3, 1981. This action was related to the action entitled *State of Michigan, et al.* v. *City of Allen Park, et al.*, 501 F. Supp. 1007 (D.C. Mich. 1980), aff. by the Sixth Circuit Court of Appeals on October 8, 1981, cert. denied, 72 L. Ed. 2d 443 (1982), wherein the district court ordered construction of a sewer separation project within the City of Allen Park.

Petitioner City of Allen Park alleged in its complaint that respondents Ecorse Creek Pollution Abatement Drain No. 2 Drainage District and Charles N. Youngblood, Drain Commissioner of Wayne County, Michigan, had failed to act in accordance with Chapter 20 of the Drain Code of 1956, M.C.L.A. 280.461 *et seq.* (a Michigan statute) in apportioning the costs of the court-ordered drainage project. Petitioner city sought review of the 93.4426% assessment of the local share of the 57 million dollar project, which meant that the petitioner would be responsible for approximately $12,700,000.00.

The statutory procedures for apportionment under Chapter 20 of the Drain Code of 1956 require that a public hearing on the apportionment of costs be held (A-22). The apportionment hearing was held in the City of Allen Park's municipal hall, and publicity and public participation rendered the proceedings subject to considerable scrutiny by the public (A-94).

During a post judgment proceeding on May 20, 1981, in the case of the *State of Michigan* v *City of Allen Park, et al., supra*, the district court made certain statements concerning the City of Allen Park. Since this present litigation was pending before that very same trial judge, those remarks cast doubt about the impartiality of the judge in this present case. In addition, the trial judge did

acknowledge certain extra-judicial contacts with opposing counsel and with an unspecified number of residents of the City of Allen park by a letter dated February 13, 1981. These extra-judicial contacts were without any notice of any kind to counsel for petitioner. The district court also made certain remarks indicating his belief that opposing counsel would not ever let the district court do anything it shouldn't do. This opposing counsel, Mr. Charles Moon, a prominent bond counsel, was largely responsible for the very apportionment which was the subject matter of this present litigation.

By order dated July 13, 1981, the district court denied the motion for recusal (A-52), and on August 10, 1981, the district court ordered that the complaint of Plaintiff for superintending control be dismissed (A-29). Petitioner City appealed as of right to the Sixth Circuit Court of Appeals which affirmed by order dated November 15, 1982 (A-4), and the Sixth Circuit Court of Appeals denied the petition for rehearing and suggestion for rehearing *en banc* on January 11, 1983 (A-9).

REASONS FOR GRANTING THE WRIT

This case involves the most important kind of issue which can possibly come before this Court — the proper administration of justice within the federal judicial system. In particular, this Court is asked to review, as a matter of first impression, the standards which must govern recusal of a trial judge for actions creating an appearance or question of partiality. 28 U.S.C. § 455(a).

Without review by this Court, confusion will exist among the circuits as to the correct standards governing a recusal motion. Petitioner raised several actions by the trial judge which should raise a question as to the

appearance of partiality. The trial judge himself denied recusal based upon his own subjective belief he could fairly sit. Without benefit of any record as to what a reasonable local observer would think, the Court of Appeals affirmed denial of recusal.

The grant of this Writ is necessary to set forth uniform recusal standards throughout the various districts and circuits. This Writ is necessary to decide if those objective standards to be utilized in a 28 U.S.C. § 455(a) recusal motion must be based on an observer within the locale of the offending court or may be based on a circuit-wide or national standard. Review by this Court is further necessary to cure an apparent miscarriage of justice by the denial of recusal under the facts of this case. Denial of this Writ will leave stand those actions of the trial court which can only serve as an unfortunate precedent for bench and bar alike.

Grant of this Writ will benefit and promote the fair administration of justice within the federal judiciary. It will serve to unify those standards to be utilized in recusal motions from district-to-district and circuit-to-circuit. This Writ is necessary to unify that standard as being based on an observer within the locale of the court in question. Petitioner further believes this Writ will clarify the scope of appellate review in the absence of a lower court record as to objective criteria.

I.

IN THIS HIGHLY-CONTROVERSIAL CASE, THE ACTIONS OF THE TRIAL JUDGE CLEARLY GAVE RISE TO A QUESTION OR APPEARANCE OF PARTIALITY IN THE MIND OF A REASONABLE LOCAL OBSERVER FAMILIAR WITH THE FACTS OF THIS CASE, AND SHOULD HAVE REQUIRED RECUSAL UNDER 28 U.S.C. § 455(a).

During the pendency of these proceedings challenging the apportionment, certain events occurred on the part of the presiding trial judge which led to a motion for disqualification or recusal under 28 U.S.C. § 455(a). This motion was addressed to events which might, in the mind of a reasonable observer, give rise to serious questions of partiality, or the appearance thereof, on the part of the trial judge. The allegations in support of this motion are each clearly set forth and admitted in the record. They included:

1. That on or about February 13, 1981, the trial judge sent an extra-judicial letter to an unspecified number of Allen Park citizens which itself contained an advocative position contrary to that of the City of Allen Park and included a chronology of events in support of the position set forth in the letter (A-39, 62-63).

2. That the chronology itself was obtained by extra-judicial request to counsel for the Drain Commissioner without knowledge or participation by legal counsel for Allen Park (A-94).

3. That the chronology is itself inaccurate and further, includes events which would have occurred subsequent to judgment in the case apparently being referred to by the trial court in his letter.

4. That at a hearing before the trial court on a post judgment motion on May 20, 1981, the trial court indicated that attorney Charles Moon, opposing counsel in this present apportionment case, would never lead the court astray or allow the court to do anything it shouldn't do (A—77-79).

5. That the real culprit in the sewer separation case was the fact that the people of Allen Park had no leaders (A-77).

The earlier related case was an action brought by certain contractors along with Michigan Department of Natural Resources and U.S. Environmental Protection Agency against the Wayne County Drain Commissioner and the City of Allen Park to require completion of a certain sewer separation project. This project included five (5) actual sewer construction contracts and one (1) contract (Contract 13) for a sanitary retention basin. Although at the time of proceedings on the first case the retention basin had not yet been located, the court did enter judgment on June 30, 1980, requiring the project to move forward. *State of Michigan, et al.* v *City of Allen Park, et al.*, 501 F. Supp. 1007 (1980), affirmed October 8, 1981, *cert. den.* 72 L. Ed. 2d 443 (1982). During the trial of the sewer separation case, attorney Charles Moon did appear in those proceedings as an *amicus curiae*. During that proceeding it was the belief of counsel for Allen Park that Mr. Moon was acting as a neutral *amicus* solely for purpose of advising the court.

On or about April 15, 1981, the Department of Natural Resources filed its motion to compel the Drain Commissioner to proceed with site selection for the retention basin (A-53 *et seq.*). By the time this motion was filed counsel for Allen Park had learned through subsequent Drain Commission records that indeed Mr. Moon had not only been paid by the Drain Commissioner for all his activities as an *"amicus"* but further, that Mr. Moon had in fact been paid for consulting with the attorneys for opposing parties in that case. This matter was properly raised to the trial court in Allen Park's response to DNR's motion to compel site selection.

The case presently at bar is based on events and actions of the Wayne County Drain Commissioner and the Ecorse Creek Pollution Abatement Drain Board which occurred subsequent to the judgment in the earlier case. These events involve the apportionment of costs for the sewer separation and retention basin contracts which were ordered by the trial court in the earlier case. The apportionment of costs was an administrative action of the Drain Board based upon the legal opinions and advice of the legal counsel for the Drain Board. That legal counsel was once again Mr. Charles Moon. Mr. Moon was intimately involved with the preparation and ultimate decision for apportionment — the very decision that is involved in this present case. The apportionment decision of the Drain Board was adopted on December 29, 1980. Suit was initiated in the Wayne County Circuit Court on or about January 8, 1981, and subsequently removed to the Federal District Court by the Wayne County Drain Commissioner on or about February 3, 1981. Mr. Charles Moon in this present case is shown as an attorney of record for the Wayne County Drain Commissioner and is obviously a direct adversary to the City of Allen Park, Plaintiff in these proceedings.

The hearing before the trial court on the motion to compel retention basin site selection (Contract 13 in the earlier case) was held before the trial judge on May 20, 1981.* Since the present case was then pending before the same trial judge with the presence of Mr. Moon as an adversary to Allen Park and having been directly responsible for the apportionment decision being challenged, it was no wonder that many people within the city of Allen Park became greatly concerned with the trial court's remarks concerning Mr. Moon. At A—77-79 the record of the hearing before the trial judge on May 20, 1981, reveals the following comments. Again, although these comments were post-judgment with regard to the sewer separation case, this present apportionment case was still pending before this very same trial judge. Needless to say, both cases had been receiving a great deal of public attention through the media, public hearings, television coverage, and the involvement of citizens' groups with literally thousands of members. The remarks caused a great number of raised eyebrows:

> "THE COURT: You know what the real problem in this case is? The real problem is not that nor is it the real problem that I will be led astray by anything that Mr. Moon would say. And I don't think Mr. Moon would ever want to lead me astray. I don't think he is that kind of a person.
>
> "But to get really down to the problem here, the mischief in this case is that the public officials, the leaders of Allen Park, the people who helped make this decision some years ago, where are they now? Where are they now, the people that implored the grant of Federal funds for this project?

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* A-53, *et seq.*

> "Allen Park, as you know, was an enthusiastic supporter of this project. Where are these leaders of yesterday? Now, I can understand why people are confused. They have no leaders. Well, it is easy now to say: 'we don't care about a little pollution in our backyard if we don't have to pay some more taxes.' But the real mischief here, the real difficulty here is that these people who decided these things after public hearings in Allen Park — the record has been made — their voices are not raised. Do they still live in Allen Park? (A—77-78)
>
> * * *
>
> "THE COURT: I am satisfied, looking back at the role that you [Mr. Moon] did have, and I am satisfied that no matter what the situation was, if you didn't think I could properly act you would have advised me, notwithstanding whatever the result of that would have been."

It is small wonder that in this present case where Mr. Moon was not only adversary counsel but indeed largely responsible for the decision which is the subject of the suit, that many eyebrows were raised within the City of Allen Park as to whether this trial judge could be truly impartial. This present action was pending before this same trial judge at the very time these remarks were made.

Similarly, the letter from the judge to citizens within Allen Park on February 13, 1981 (A-39), and the annexed chronology to that letter, raise serious questions as to the appearance of impartiality on the part of the trial judge. This letter was written without prior notification to counsel for Allen Park and was written some eight (8) months after the final judgment of the court in this

matter. The letter is reflective of the advocative position taken by parties in opposition to the City of Allen Park and the annexed chronology is likewise one-sided and misleading. There can be no excuse for a trial court with a case pending before it to engage in such advocative writings.

In spite of the efforts by the trial court to justify its chronology as simply having been gleaned from the record of the sewer separation case, it is apparent on its face that the chronology goes beyond the date of judgment. The last two (2) entries on the chronology are shown as December, 1980, and January, 1981. Judgment in that case was entered on June 30, 1980 and opinion dated November 6, 1980.

Again, at the May 20, 1981 hearing on the motion to compel site selection, the trial judge acknowledged that he had written the letters and further, that he had *ex parte* communications with legal counsel for the Drain Commissioner to obtain the chronology. At A—62-63, the record of the hearing of May 20, 1981, reflects the following comments by the trial court:

> "[BY COURT]: But I did something that I have never done before, and that is, I wrote a letter to the people that up that time [sic] had written to me. And I asked Mr. Tiplady [legal counsel for Drain Commissioner] in order to prepare that letter, to give me a chronology of what had occurred in the past . . . "

After serious consideration and after communication with the trial judge, Allen Park filed its motion to disqualify the trial court based upon 28 U.S.C § 455(a) and the Court of Appeals' recent decision in *Roberts* v *Bailar*, 625 F. 2d 125 (6th Cir, 1980). Allen Park's motion was based upon the obvious appearance of partiality

within the meaning of § 455(a) and the objective standard enunciated in *Roberts, supra*. The motion was based upon the comments made by the trial court at the May 20, 1981 hearing, as well as the February 13, 1981 letter from the trial judge to various citizens with the attached chronology. The motion also included correspondence from counsel for Allen Park to the court dated June 2, 1981 (A-47), with a reply from the trial court dated June 2, 1981 (A-49). The motion was predicated largely on the fact that the matters then pending before the court were of great financial and public significance to the City of Allen Park and involved many thousands of citizens. Public hearings and media coverage involved a majority of persons living within the City of Allen Park and likewise involved and interested many people within the surrounding areas. In a situation such as this, § 455(a) should give rise to an even greater duty on the part of the trial court to recuse himself where his comments and actions create a reasonable doubt or question of partiality.

Hearing on the motion for recusal was held before the trial judge on June 30, 1981.* The record of that proceeding will reflect the substantial concern on the part of the City of Allen Park with the continued appearance of justice on the part of the trial court being able to fairly deal with the apportionment case presently pending before it. Although the motion was based upon only subparagraph (a) of § 455 (the appearance of partiality) and the objective test thereunder, the trial court resorted to the older subjective standard and ruled that he did not feel he was partial in the matters then pending before him or that he could not act impartially (A-103).

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* A-80, *et seq.*

28 U.S.C. § 455(a) was enacted by Congress to ensure that an appearance of justice will always be maintained in the Federal Courts. The *appearance* of justice and impartiality is just as important as actual justice or impartiality. In this respect, subparagraph (a) is to be differentiated from subparagraph (b), the latter actually requiring some indicia of bias, prejudice or actual favoritism in a cause. The Sixth Circuit had made this distinction clear in the recent case of *Roberts* v. *Bailar, supra*. *Roberts* involved a complaint alleging sexual discrimination by the plaintiff's superiors at the Knoxville, Tennessee Post Office. At a pretrial hearing, the District Judge granted a motion to dismiss Knoxville Postmaster, C. Edwin Graves, as a defendant and to substitute the Postmaster General of the United States. In the pretrial hearing, the District Court apparently made a remark, similar to the case at bar to the effect that he knew Mr. Graves and "he is an honorable man and I know he would never intentionally discriminate against anybody" (625 F. 2d 125, 127). A request was made of the District Court to recuse itself because of this remark, but the Court felt that it was "confident of its ability to conduct a fair trial of the merits of this case" and, therefore, declined to recuse itself (625 F. 2d 125, 128). The Court of Appeals held that the District Judge had an independent duty to recuse himself under 28 U.S.C. § 455(a):

> "Section 455(a) is a self-executing provision for the disqualification of federal judges. There is no particular procedure that a party must follow to obtain judicial disqualification under § 455(a). Instead, the section sets forth a mandatory guideline that federal judges must observe *sua sponte*." (625 F. 2d 128)

In the case at bar, the District Court erred in a very analogous fashion to the *Roberts* case, *supra*. The various comments concerning the leaders of Allen Park and the District Judge's belief in Mr. Moon's representations were squarely within the ambit of the rule in *Roberts*. The trial court attempted to justify his actions by asserting that because he was merely reviewing the actions of the Drainage Board as a court of appeal, that his personal feelings would not matter. But such comments go not merely to the presence of Mr. Moon as counsel, because Mr. Moon was also intimately involved with the Drainage Board apportionment decision, which is the very subject matter of this suit. During all of the apportionment hearings, Mr. Moon served as legal advisor, sitting with the Drainage Board members, and played a significant role in actually formulating the very apportionments which are called into question in this case. The trial court's comments that Mr. Moon would never lead the court astray certainly create an aura or lack of impartiality since one must also presume the court to believe that Mr. Moon would never lead the Drainage Board astray and, therefore, the apportionments must obviously be correct.

The Court in *Roberts, supra*, reflected the holdings of the various circuits as to the changes affected by sub-rule 455(a). *Formerly*, such a determination by the trial court could be based upon the *subjective* determination of the trial court as to his own belief and fairness of proceeding with the case. A trial judge formerly had a duty to sit. *The standard is now objective* and must turn on what a reasonable person, knowing all of the relevant facts, would think about the impartiality of the judge. The trial court at bar failed to apply that standard:

> "If there is a *reasonable factual basis* for doubting the judge's impartiality, the Congressional

> Committee reports on the 1974 amendment to § 455 explain the judge *should* disqualify himself and let another judge preside over the case. *Even where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial."* (emphasis added) (*Roberts, supra*, 625 F. 2d at p. 129)

The District Court herein, chose to refer to the legislative history of § 455(a) to substantiate his refusal to properly recuse himself. However, the trial court's resort to legislative history was totally improper. A trial court should not refer to legislative history of the statute when a statute is easily understandable and unambiguous. See *Dow Chemical Co.* v. *United States E.P.A.*, 635 F. 2d 559 (6th Cir, 1980):

> "Courts do not turn to legislative history to shed light on meaning of reasonably understandable and unambiguous statutory enactments."

See also *U.S.* v. *Oregon*, 81 S. Ct. 1278, 366 U.S. 643, 6 L. Ed. 2d 575, rehearing denied, 82 S. Ct. 24, 268 U.S. 870, 7 L. Ed. 2d 70 (1961); *Markham* v. *Colonial Mortgage Service Co., Associates, Inc.*, 605 F. 2d 566 (D.C. Cir, 1979).

In the case at bar, clearly, the trial court applied the former *subjective* standard in determining its own impartiality; the actions and activities in this case clearly show that the objective standard has not been met. Mr. Moon's connection with the Drainage Board and its decision making processes casts suspicion and a *"reasonable factual basis"* for doubting the trial court's impartiality. The events which have transpired since the filing of this present cause would well cause a reasonable outside observer to at least question the impartiality of the court below within the meaning of § 455(a).

Likewise, it is well settled that extra-judicial statements or conduct may be a basis for disqualification. See *Fong* v. *American Airlines, Inc.*, 431 F. Supp. 1334 (N.D., Cal, 1977) citing *U.S.* v. *Grinnell Corp.*, 384 U.S. 563, 583, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); in *Bradley* v. *Milliken*, 620 F. 2d 1143 (6th Cir, 1980) the Court stated:

> "To make out a case for recusal under § 455(a) *a movant must rely on extra-judicial conduct rather than matters arising in a judicial context.*" (emphasis added) (620 F. 2d 1157)

Clearly, the Honorable John Feikens sustained contact of an extra-judicial nature. The letter which he circulated to these citizens who communicated with the court had attached to it what purported to be a chronology of events that occurred up to the time of the letter. Even the impartiality of the chronology itself, must be questioned. It was, in fact, prepared by a representative of the Drain Commissioner, obtained by the court *outside* the normal course of judicial proceedings. The Wayne County Drain Commissioner who prepared the "chronology of events" is a party hostile and adverse to the City of Allen Park because it is he who presides over Drainage Board meetings and it is they who determined the apportionment costs to the City of Allen Park. It is the procedure which was utilized in apportioning those costs by the Drainage Board which is the very heart of the present litigation.

II.

THE LOWER COURTS HAD A DUTY TO MEASURE QUESTIONS OF PARTIALITY AGAINST AN OBJECTIVE REASONABLE STANDARD, UTILIZING COMMUNITY MORES, CUSTOMS, PRACTICES AND BELIEFS AND THE LOWER COURTS ERRED IN NOT TAKING LOCAL STANDARDS INTO ACCOUNT IN ASSESSING APPEARANCES OF PARTIALITY OF THE TRIAL JUDGE.

28 U.S.C. § 455(a) is in a way a modern codification of the words of Mr. Justice Frankfurter in *Offutt* v. *United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1954):

> "justice must satisfy the appearance of justice."

The lower courts in this present case would unduly limit the "appearance" test to whether the trial judge himself or the reviewing court believed the trial court could impartially sit. Although the Court of Appeals conceded the test to be an objective one, it nonetheless denied recusal without even a consideration of what the *affected* members of the public might believe. In this case which threatens the welfare of so many Detroit and Allen Park area citizens, it is quite immaterial to theorize how citizens of Kentucky, Tennessee, Ohio, or any other state would view the trial court's impartiality. The ability to "know all the relevant facts" necessarily pre-supposes a reasonable, objective observer within the locale of the court. Toward this end, it must be incumbent upon the trial judge in the first instance to generate a record of this "observer" which would be susceptible of appellate review. This present matter suffers a lack of lower court record. The Court of Appeals, without such a record, cannot know what a person familiar with all the facts and circumstances might believe of the fairness of the judicial

proceedings. The "appearance" test of 28 U.S.C. § 455(a) cannot be satisfied by using a circuit-wide or national "public." The "public" must have some proximity to the matter in controversy, especially in a case such as this affecting thousands of local residents.

Although recusal was denied in *Smith* v. *Pepsico, Inc.*, 434 F. Supp. 524 (D.C., Fla. 1977)*, Petitioner urges adoption of the locale standard therein set forth by Judge Roettger:

> "Inasmuch as 'appearance of partiality' may vary from district to district it would seem appropriate to apply a 'community standard' (if that principle may be borrowed from the obscenity field) to recusal questions under § 455(a)." (434 F. Supp. at 526).

The trial judge in this present case employed the former subjective or 'duty to sit' test to this § 455(a) motion.** The Court of Appeals had no record information as to what an observer in the community might have believed. In the absence of such a record

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* Recusal urged on basis that opposing counsel was former law clerk to judge.

** "I do not believe that my impartiality in this case is in any way affected by the comments that I have made as to Mr. Moon or the letters that I have written to the citizens of Allen Park who wrote me in good faith asking for the reasons for my decision. In both cases, I dealt with the matter when it was raised on the record. When I wrote to the citizens of Allen Park, I stated to them exactly how I had obtained the information and why I was submitting it to them. All of this is matter of record.

"I have not dealt, in my view, extra judicially in this case, and, therefore, your motion, I must say reluctantly, is denied — because I have got to find some way to get out of these sewer businesses. I haven't succeeded yet." (A-103)

appellate courts should not interpose their own views as if on a *de novo* review. Remand was required for proper assessment of the objective basis for questioning impartiality. Utilization of a circuit-wide public instead of the affected public obviates the very purpose of § 455(a) — to insure the appearance of impartiality as well as actual impartiality.

In *State of Idaho* v. *Freeman*, 507 F. Supp. 706 (D.C. Idaho, 1981), the Court set forth an erudite and comprehensive history of § 455(a). At 507 F. Supp. 721, Judge Callister finds:

> "One of the most important parts of the new section 455 was the opening subsection (a). This subsection was denoted as a catch-all provision to supplement the grounds for disqualification under subsection (b). This general standard provides for self-disqualification in a proceeding in which a judge's 'impartiality might reasonably be questioned,' thus adopting the objective standard advocated by the ABA canon. This new objective standard has been at various times referred to as 'the reasonable man,' 'a reasonable appearance,' or 'the reasonable factual basis' test. *See Parrish* v. *Board of Comm'rs of Alabama State Bar*, 524 F.2d 98, 103 (5th Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The Fifth Circuit in *Parrish* articulated the test as one where a claim under subsection 455(a) is 'supported by facts which would raise a reasonable inference of a lack of impartiality on the part of the judge in the context of the issues presented in a particular law suit.' *Parrish, supra*, at 103-04. The Reporter for the ABA Committee that drafted the Code of Judicial Conduct (from

which the standard of subsection 455(a) is taken verbatim) explained the standard as follows:

> Any conduct that would lead a reasonable man *knowing all the circumstances* to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification.

Thode, Reporter's Notes to Code of Judicial Conduct (1973), 100. (emphasis added)

"Therefore, while the standard under subsection 455(a) is an objective one, and the same section in no way pre-empts a judge from considering the basis of the motion to disqualify, it appears appropriate for the judge to evaluate all the facts and circumstances surrounding the alleged appearance of impartiality and determine if a reasonable, uninvolved observer would question the judge's impartiality. One commentator has pointed out with respect to the standard found in both the Code of Judicial Conduct and section 455:

> The test actually adopted in the Code . . . seeks to guarantee not only that a biased judge will not participate but also that no reasonable person will suspect as much; the *appearance* [emphasis in original] of impartiality throughout the judiciary is the goal. The fact that the Code adopts the standard of a reasonable man knowing all the facts does not reduce this emphasis on appearance. Hidden facts indicating partiality may at any time come into public view and therefore are legitimate elements of

> an appearance test; *and hidden facts tending to rebut an inference of partiality are presumably in the judge's power to reveal once public suspicion of his partiality in a given instance has been aroused.* (citation omitted) (emphasis added)

Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv.L.Rev. 736, 745-46, (1973).

* * *

> "The adoption of the 'appearance of impartiality' test implemented in section 455(a), besides creating an objective standard, was also intended to relieve the conflicting duties imposed on judges of *sua sponte* disqualification, and the 'duty to sit' in proper cases. The legislative history of the new section made it clear that the 'duty to sit' rule had been done away with. By eliminating the 'duty to sit' rule Congress hoped to 'enhance public confidence in the impartiality of the judicial system.' H.R.Rep.No.1453, 93d Cong., 2d Sess. 2, 5 (1974), *reprinted in* [1974] U.S.Code Cong. & Ad.News at 6352, 6355."

Although of admirable origin, the "duty to sit" philosophy applied by the trial judge in this case, must yield to the clear mandate of § 455(a). The court's duty is as much to the administration of justice itself as it is to the litigants or even colleagues on the bench who may inherit a difficult or unpopular case.

This view is succinctly stated in *United States* v. *Ferguson*, 550 F. Supp. 1256 (D.C., N.Y., 1982). There, the trial judge's former law clerk was involved with the grand jury proceedings at issue before the court. In a sensitive and thoughtful opinion the trial judge felt the appearance of fairness necessitated his recusal:

> "Despite the Court's subjective view that all matters can be resolved impartially, a judge has an independent duty to disqualify himself 'in any proceeding in which his impartiality might reasonably be questioned.' The issue then is not the Court's own introspective capacity to sit in fair and honest judgment with respect to the controverted issues, but whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality. This is an objective standard and 'where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial.' " (550 F. Supp. at 1259). (footnote citations omitted)

The mandate of § 455(a) is designed to protect the public — and ultimately therefore, the administration of justice itself. It is not a technical rule to be finely distinguished by judges and litigants. At issue are the rights of the public — the average person on the street. As the Court noted in *Potashnick* v. *Port City Construction Co.*, 609 F. 2d 1101 (CCA 5, 1980) at 1111:

> "the protection of the integrity and dignity of the judicial process from any hint of bias is the palladium of our judicial system."

The common sense of the average person in the community must be the standard. Any doubts must be resolved in favor of recusal. *Roberts* v. *Bailar, supra*; *Potashnick, supra* at p. 1112:

> "The use of *'might* reasonably be questioned' in section 455(a) (emphasis added) clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case."

CONCLUSION

Petitioner respectfully prays this Honorable Court grant this Petition for Writ of Certiorari and upon consideration of this cause to vacate the Judgment and Orders of the lower courts.

Respectfully submitted,

FEILER AND GLASS
Counsel for Petitioner

By: /s/ MICHAEL H. FEILER (P13340)
Of Counsel for Petitioner
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(313) 386-1111

Dated: April 7, 1983

APPENDIX

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IN THE

Supreme Court of the United States

October Term, 1982

CITY OF ALLEN PARK
Petitioner,

v

ECORSE POLLUTION ABATEMENT DRAIN NO. 2 DRAINAGE DISTRICT, a body corporate and CHARLES N. YOUNGBLOOD, Wayne County Drain Commissioner,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOCKET ENTRIES

(State of Michigan — County of Wayne — District Court)

1981

Feb. 3. Petition for removal from the Circuit Court for the County of Wayne, filed.

Feb. 3. Bond for Removal, filed, (cash bond $500.00, receipt #25814).

Feb. 9. Answer of deft's. to complaint.

Feb. 9. Ecorse Pollution Abatement Drain No. 2 Drainage District Proceedings with attachments.

Feb. 12. Proofs of service of #1 & #2.

Feb. 17. Order of reassignment to Hon. John Feikens.

May 7. Plft's motion to remand w/brief, notice of hearing set for 5/26/81 @ 2:30pm and proof of service.

May 11. Deft's motion for summary judgment (approved w/out brief per Bonnie Humm), notice of hearing set for 5/26/81 @ 2:30pm w/proof of service.

May 22. Pltf's notice of objection & response to motion for summary judgment with brief & proof of service.

May 26. Dft's answer to pltf's motion to remand.

May 26. Deft's brief in opposition to pltf's motion to remand.

May 26. Deft's brief in support of motion for summary judgment.

May 26. Motion to remand heard & denied, motion for summary judgment heard & continued to 6/9/81.

June 5. Pltf's Brief in opposition to Motion for Summary Judgment w/proof of service.

June 9. Pltf's motion for disqualification pursuant to 28 USC 455(a) with memorandum, attachments, affidavit of Michael H. Feiler, notice of hearing set for 6/30/81 @ 2:30pm and proof of service.

June 9. Motion for summary judgment heard and taken under advisement. Feikens, J.

June 15. Letter to Ross Palmer re: corrections in transcript.

June 29. Motion to disqualify denied.

July 13. Proposed findings of fact and conslusions of law on behalf of pltf., City of Allen Park w/proof of service.

July 13. Defts' proposed findings of fact and conclusions of law.

July 14. Order denying pltf's. motion for recusal.

July 16. Opinion that the complaint of pltf for superintending control (certiorari) is dismissed, the petition for issuance of a writ of certiorari is denied, and the writ is quashed and the final order of apportionment dated & filed 12/29/80, is hereby confirmed and held not subject to attack in any court. Feikens, J.

Aug. 20. Order dismissing complaint for superintending control. Feikens, J.

Sept. 1. Notice of appeal by pltf. of #19 & #20 w/proof of service.

Sept. 2. Proof of service of notice of appeal to Robert Tiplady, CCA and Ross Lee Palmer.

Sept. 2. Notice to counsel Feiler re: appeal procedures w/request for designation of record on appeal attached.

1982

Nov. 15. Judgment of District Court affirmed.

1983

Jan. 11. Order denying petition for rehearing.

Jan. 19. Mandate issued.

ORDER

(United States Court of Appeals
for the Sixth Circuit)

(City of Allen Park, a Michigan municipal corporation, Plaintiff-Appellant v. Ecorse Creek Pollution Abatement Drain No. 2 Drainage District, a body corporate, and Charles N. Youngblood, Wayne County Drain Commissioner, Defendants-Appellees No. 81-1554)

(Filed Nov 15, 1982)

Before: KENNEDY, MARTIN, and WELLFORD, Circuit Judges.

The City of Allen Park appeals the dismissal of its complaint for superintending control. By its complaint, it alleges that the Ecorse Creek Pollution Abatement Drain No. 2 Drainage District and Charles N. Youngblood, Drain Commissioner-elect of Wayne County, Michigan, failed to act in accordance with Chapter 20 of the Drain Code of 1956, M.C.L.A. 280.461 *et seq.*, in apportioning the costs of a court-ordered drainage project. Additionally, Allen Park appeals the denial of its motion requesting that the district judge recuse himself pursuant to 28 U.S.C. § 455(a) (1982). We affirm the district court in both respects.

I.

We note, by way of background only, that the action before us has a long and multi-faceted ancestry well-documented and recounted in *State of Michigan* v. *City of Allen Park*, 501 F. Supp. 1007 (D.C. Mich. 1980), affirmed by order of this Court on October 8, 1981 (No. 80-1554), *cert. denied*, 40 U.S.L.W. 3835 (April 19, 1982), and in the opinion of the district court in this action. We need only include a brief summary here.

Allen Park is one of several suburban Detroit communities which the Michigan Water Resources Commission found were polluting the Ecorse River by discharging sewage into the River's tributaries. In compliance with an order of the state Department of Natural Resources, the polluting communities took the initial steps to halt pollution. By 1978, the communities and appropriate agencies had agreed upon a plan to construct a new sewer system. Appropriate permits were obtained, bids for construction solicited, and costs apportioned between the relevant state and federal agencies and the affected communities.

Not surprisingly, when the first set of bids were received from the construction companies, it became apparent that the cost of the project would exceed the initial estimates. Allen Park sued to enjoin further action on the project. The parties settled by agreeing to divide the project into two segments. Central to the settlement was the commitment by Allen Park, the sole community with responsibility for Segment II, to complete construction by March 31, 1982.

Allen Park failed to comply with the time schedule. Litigation ensued to force compliance and in November, 1980, the district court ordered Allen Park and the Drain Commissioner to proceed with the financing and construction of Segment II. *City of Allen Park*, 501 F. Supp. at 1024. Accordingly, the Drain Commissioner held apportionment hearings and ultimately issued a Final Order for Apportionment. Allen Park filed a complaint for superintending control challenging the order. The action was removed to federal court on pendent jurisdiction grounds.

II.

We deal first with the district judge's denial of Allen Park's motion for recusal pursuant to 28 U.S.C. 455(a) (1982). Section 455(a), as amended, provides, in pertinent part, that "any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In *Roberts* v. *Bailar*, 625 F.2d 125 (6th Cir. 1980), we held that section 455(a) imposes upon a judge an independent, self-executing duty to recuse himself whenever his impartiality might reasonably be questioned. The test is an objective one. By objective, we meant "what a reasonable person *knowing all the relevant facts* would think about the impartiality of the judge." *Id.* at 129 (emphasis added).

Applying that standard to the record before us, we conclude that neither the court's remarks about attorney Moon nor the letter sent to Allen Park's citizens accompanied by the chronology of events could, when viewed individually or collectively and in the proper context, reasonably be taken as evidence of partiality.

III.

Allen Park also raises a number of additional issues, all of which relate in some manner to the actions of the Drainage Board and Commissioner Youngblood in apportioning the costs of Segment II. Specifically, Allen Park alleges that the Drainage Board failed to comply with statutory notice requirements, thereby rendering its apportionment determination invalid; that apportionment was premature because one of the six contracts essential to completion of the project had yet to be secured at the time of apportionment; that the Board

failed to consider the benefits accruing to each public corporation in apportioning costs, thereby rendering its determination arbitrary and capricious; that the Board's failure to obtain estimated as opposed to actual costs for the project did not comply with the appropriate statutes; and lastly, that the Board's conclusion that the project is necessary for public health is error as it was unsupported by any evidence before the Board. We disagree. There is substantial evidence in the record to support the actions of the Drain Board and its Commissioner.

The dismissal of the complaint for superintending control and the confirmation of the Final Order of Apportionment are affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John Hehman
Clerk

*This order was prepared by Judge Martin.

ORDER

(United States Court of Appeals
for the Sixth Circuit)

(City of Allen Park, a Michigan municipal corporation, Plaintiff-Appellant v. Ecorse Creek Pollution Abatement Drain No. 2 Drainage District, a body corporate, and Charles N. Youngblood, Wayne County Drain Commissioner, Defendants-Appellees No. 81-1554)

(Filed Jan. 11, 1983)

Before: KENNEDY, MARTIN, and WELLFORD, Circuit Judges.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's opinion;

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman/cs
Clerk

PETITION FOR REHEARING AND SUGGESTION FOR HEARING EN BANC OR, IN THE ALTERNATIVE, TO CORRECT RECORD OPINION IN THIS COURT

(In the United States Court of Appeals for the Sixth Circuit)

NOW COMES Plaintiff-Appellant, City of Allen Park, by and through its attorneys, Pagnucco & Kruse (per Kenneth D. Kruse) and Feiler and Glass (per Michael H. Feiler) and respectfully moves this Honorable Court for rehearing pursuant to Rule 40 F.R.A.P. and does further request a hearing *en banc* pursuant to Rule 35 F.R.A.P., and does further move this Honorable Court, in the alternative, to correct its opinion of record in this cause; in support whereof Plaintiff-Appellant shows unto this Honorable Court the following:

1. As counsel for Plaintiff-Appellant in this cause, I do express a belief, based upon a reasoned and studied professional judgment, that the panel decision in this cause is contrary to the following decision of the United States Court of Appeals for the Sixth Circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court; see *Roberts* v. *Bailar*, 635 F2d 125 (6th Cir. 1980) and *Bradley* v. *Milliken*, 620 F2d 1143 (6th Cir. 1980). I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

A. Does the Court of Appeals in reviewing a denial of recusal under 28 U.S.C. § 455(a) review the decision of the trial court as in *Roberts* v. *Bailar* and *Bradley* v.

Milliken, or does the Court of Appeals impose its own reasonable objective standards *de novo*, as it did in this present case;

B. Should a review of a motion for recusal under 28 U.S.C. § 455(a), utilizing a reasonable objective standard, be based upon a reasonable objective person in the district or locale of the district court rather than what this Court may perceive to be a reasonable person in some other locale or some other area within this Circuit or the United States;

C. Should this Honorable Court in its record opinion, in this highly controversial case, attempt to characterize lower court records in a manner unfavorable to Plaintiff-Appellant where such records were nowhere made part of the record in this proceedings.

2. The one major uncontroverted fact throughout these present proceedings is the great public controversy which has surrounded the proposed sewer separation project within the City of Allen Park and which has closely involved these apportionment proceedings both in the trial court and in this Honorable Court's review of the trial court proceedings.

3. That the measure of the complained of activity of the trial court raised pursuant to a motion for recusal under 28 U.S.C. § 455(a) should have been reviewed both by the trial court and by this Honorable Court in light of the public controversy and public scrutiny which has attended upon these proceedings and that this Honorable Court in its review, should have given *special consideration* to such a situation of public scrutiny, public concern, and public controversy. See *e.g. Bradley* v. *Milliken, supra*.

4. Indeed, the allegations raised with regard to the recusal motion suggest certain activities by the trial court involved in certain comments with regard to opposing counsel, extra-judicial communications with opposing counsel, extra-judicial communications to various citizens of the City of Allen Park, the inclusion of a highly slanted and biased chronology which was sent to various citizens of Allen Park, and certain derogatory comments regarding the City of Allen Park, during the course of these proceedings. That the trial court did *never* review his actions in accordance with the requirements of this Court in *Roberts* v. *Bailar, supra,* nor consistent with 28 U.S.C. § 455(a), but instead used the old subjective test as to whether the trial court believed he could fairly sit.

5. That this honorable Court by its opinion in this cause, leaves standing this erroneous decision by the trial court thereby creating a conflict within this Circuit as to the proper and applicable standard for recusal under 28 U.S.C. § 455(a) and further, whether it is a duty in fact encumbant upon the trial court to properly review such motions. The decision by this Honorable Court would appear to wholly negate any function of the trial court in applying a reasonable objective question test and this court would appear to be thus imposing or thus interposing a *de novo* review upon such matters.

6. That this Honorable Court in its affirmation of the denial for recusal raised in this pleadings did not fully recite the activities of the trial court thus giving bench and bar alike, an erroneous impression of the activities complained of and of the import of the decision being made by this Honorable Court. This Honorable Court's opinion fails to fully set forth the extra-judicial communications that were involved (see *Bradley* v.

Milliken, supra); did fail to reveal the full extent of the comments made by the trial court (see *Roberts* v. *Bailar, supra*) and did wholly fail to mention that the chronology forwarded by the trial court to various citizens of Allen Park was slanted, biased and was in fact prepared by opposing party to Allen Park and was not based upon the record in any of the proceedings before the trial court.

7. That unfortunately, the opinion of this Honorable Court would appear to create diverse standards for recusal review; imposing stricter standards upon some judges and apparently looser standards upon others without this Court revealing any basis for such distinction and thereby creating considerable confusion as to how this Honorable court will apply the recusal standards set forth under 28 U.S.C. § 455(a).

8. That the decision of this Honorable Court in interposing a *de novo* review standard under 28 U.S.C. § 455(a) is in conflict with the many other circuits which have likewise reviewed recusal actions under this section.

9. That this Honorable Court in its substantive review of the apportionment proceedings record in this cause did affirm the decision of the administrative agency, the Drainage Board, based upon this Court's statement that the record reveals ample evidence to support the final conclusion reached by the Drainage Board.

10. That this Honorable Court apparently relied upon record evidence in ascertaining whether certain notice and procedural requirements were satisfied by the administrative agency Drain Board. In so doing, this Honorable Court has apparently changed or negated the standard of administrative review which requires careful

review of legal and statutory requirements and this Honorable court has thereby negated the contentions by Appellant that it was not given an opportunity to make a proper and full record so as to fully appraise this Court of the arbitrariness and capriciousness of the final apportionment decision. See *e.g. Village of Oak Park* v. *VanWagoner*, 271 Mich. 450 (1935). Thus, it becomes all the more confusing where the trial court casts the burden upon the City of Allen Park to prove its theories before the Drainage Board where, as Allen Park asserts, it was simply never given an opportunity to do so. That this Honorable Court should, under the circumstances, at least elucidate upon its conclusion that Allen Park could be held to an administrative burden where it claims it was not given an opportunity to fairly sustain that burden before the administrative agency.

11. That this Honorable Court's opinion only serves to exasperate and inflame public controversy in this cause by reason of this Court's comments regarding the suit by Allen Park to enjoin activity on the overall sewer separation project. This Court states, unfortunately, at page 2 of its opinion that:

> "The parties settled by agreeing to divide the project into two segments. Essential to the settlement was the commitment by Allen Park, the sole community with responsibility for Segment II to complete construction by March 31, 1982."

12. That Appellant has appended hereto the only orders entered in that cause referenced by this Honorable Court and has affixed thereto the seal of the clerk of the Wayne County Circuit Court. These orders will indicate that no such *commitment* was expressly or implicitly made as any part of those proceedings.

13. That for this Honorable Court to reach outside the record of these proceedings in an apparent effort to negate and neutralize the arguments of the City Allen Park can only fan the fires of public outcry and can only disserve the interests of justice in this cause by calling further into question the accuracy of such statements by this Honorable Court.

14. That as the appended exhibits reveal, Allen Park in agreeing to a settlement of the Wayne County case as shown in the attached exhibits did agree to allow construction to proceed only on the basis that there would be a reduced construction within the City of Allen Park. The present project which has been under consideration by this Honorable Court is not consistent with such an agreement for reduced construction but indeed, would represent a violation of that settlement agreement raised by this Honorable Court in these proceedings.

15. That the interests of justice and the great public controversy surrounding this matter should at least require a further clarification of the positions taken by this Honorable Court in affirming the decision of the U.S. District Court.

WHEREFORE, for all of the reasons set forth herein, Plaintiff-Appellant prays this Honorable Court will rehear this matter, *en banc*, and that upon such rehearing, that this Honorable Court will reverse the Circuit Court panel's decision and remand this matter to the trial court for proper consideration. In the alternative, Plaintiff-Appellant prays this Honorable Court will correct its record opinion in this cause concerning the comments regarding the prior lawsuit between Allen Park and the Drainage Board and further,

will correct its record concerning the extext of activities alleged under the recusal motion brought pursuant to 28 U.S.C. § 455(a).

Respectfully submitted,

PAGNUCCO & KRUSE
Attorneys for Plaintiff-Appellant
BY: KENNETH D. KRUSE (P16271)
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FEILER AND GLASS
Attorneys for Plaintiff-Appellant
By: /s/ MICHAEL H. FEILER (P13340)
32969 Hamilton Court, Suite G 100
Farmington Hills, MI 48018

Dated: November 19, 1982

municipal corporation,

Plaintiff, NO. 78 825 174 CZ

-vs-

ECORSE CREEK POLLUTION ABATEMENT DRAIN NO. 1 DRAINAGE DISTRICT, a Body Corporate, CHARLES YOUNGBLOOD, Wayne County Drain Commissioner, RAYMOND J. WOJTOWICZ, Wayne County Treasurer and COUNTY OF WAYNE, An Unchartered Michigan County,

Defendants.

ORDER TO ADJOURN AND MODIFY TEMPORARY RESTRAINING ORDER

At a session of said court held in the City-County Building, Detroit, Wayne County, Michigan, on AUG 17 1978

PRESENT: HON. CHARLES S. FARMER

On reading and filing the attached Stipulation and on motion of PAGNUCCO & KRUSE, Attorneys for Plaintiff, City of Allen Park, in the above entitled cause, it is hereby ordered:

1. That the Show Cause Hearing scheduled for August 23, 1978, at 2:00 P.M., be adjourned without date.

2. It is further ordered that the Temporary Restraining Order hereinbefore entered in this cause on August 3, 1978, be amended to allow the Ecorse Creek Pollution Abatement Drain No. 1 Drainage Board on behalf of the Ecorse Creek Pollution Abatement Drain No. 1 Drainage District to hold a

Allen

No. A 036934

STATE OF MICHIGAN, County of Wayne } ss.

CERTIFIED COPY — "LAW"

I, JAMES R. KILLEEN, Clerk of Wayne County, and Clerk of the Circuit Court for the County of Wayne, do hereby certify, that the above and the foregoing is a true and correct copy of

Stip. Order to Adjourn & Modify Restraining Order

entered in the above entitled cause by said Court, as appears of record in my office. That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County, at Detroit, this day of 11-17 A. D. 19 78

JAMES R. KILLEEN, Clerk

Fee, $ 25 , Deputy C

EXHIBIT "A"

ORDER TO ADJOURN AND MODIFY TEMPORARY RESTRAINING ORDER

(In the Circuit Court for the County of Wayne)

(City of Allen Park, a Michigan Municipal Corporation, Plaintiff, vs. Ecorse Creek Pollution Abatement Drain No. 1 Drainage District, a Body Corporate, Charles Youngblood, Wayne County Drain Commissioner, Raymond J. Wojtowicz, Wayne County Treasurer and County of Wayne, An Unchartered Michigan County, Defendants. No 78 825 174 CZ)

At a session of said court held in the City-County Building, Detroit, Wayne County, Michigan, on Aug. 17, 1978.

PRESENT: HON. CHARLES S. FARMER

On reading and filing the attached Stipulation and on motion of PAGNUCCO & KRUSE, Attorneys for Plaintiff, City of Allen Park, in the above entitled cause, it is hereby ordered:

1. That the Show Cause Hearing scheduled for August 23, 1978, at 2:00 P.M., be adjourned without date.

2. It is further ordered that the Temporary Restraining Order hereinbefore entered in this cause on August 3, 1978, be amended to allow the Ecorse Creek Pollution Abatement Drain No. 1 Drainage Board on behalf of the Ecorse Creek Pollution Abatement Drain No. 1 Drainage District to hold a new Apportionment Hearing based on reduced construction in the City of Allen Park.

/s/ Charles S. Farmer
Circuit Judge

CITY OF ALLEN PARK, a
Michigan Municipal Corporation,

Plaintiffs

C.A. No. 78 825 174 CZ

vs

ECORSE POLLUTION ABATEMENT DRAIN
NO. 1 DRAINAGE DISTRICT, a body
corporate, CHARLES YOUNGBLOOD,
Wayne County Drain Commissioner,
RAYMOND J. WOJTOWICZ, Wayne County
Treasurer and COUNTY OF WAYNE, an
Unchartered Michigan County,

Defendants

ORDER OF DISMISSAL

At a session of said Court, held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan, on OCT 10 1979

PRESENT: [illegible] J. Brown
CIRCUIT COURT JUDGE

On reading and filing the Stipulation attached hereto, and the Court being fully advised in the premises;

IT IS ORDERED that the above-entitled cause be dismissed without prejudice and without costs to any of the parties;

No. A 036933

CERTIFIED COPY — "LAW"

STATE OF MICHIGAN, } ss.
County of Wayne

I, JAMES R. KILLEEN, Clerk of Wayne County, and Clerk of the Circuit Court for the County of Wayne, do hereby certify, that the above and the foregoing is a true and correct copy of

Stip + Order to Dismiss

entered in the above entitled cause by said Court, as appears of record in my office. That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County, at Detroit, this day of 10-19 A. D. 19 79

JAMES R. KILLEEN, Clerk

Fee, $ 2.25 [signature], Deputy Clerk

EXHIBIT "B"

ORDER OF DISMISSAL

(State of Michigan
in the Circuit Court for the County of Wayne)

(City of Allen Park, a Michigan Municipal Corporation, plaintiffs, vs. Ecorse Pollution Abatement Drain No. 1 Drainage District, a body corporate, Charles Youngblood, Wayne County Drain Commissioner, Raymond J. Wojtowicz, Wayne County Treasurer and County of Wayne, an Unchartered Michigan County, Defendants. CA No 78 825 174 CZ)

At a session of said Court, held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan, on Oct. 10, 1978.

PRESENT: William J. Giovan
Circuit Court Judge

On reading and filing the Stipulation attached hereto, and the Court being fully advised in the premises;

IT IS ORDERED that the above-entitled cause be dismissed without prejudice and without costs to any of the parties;

IT IS FURTHER ORDERED that the Temporary Restraining Order issued in above-entitled cause be set aside and held for naught.

/s/ William J. Giovan
Circuit Court Judge

AFFIDAVIT OF MICHAEL H. FEILER

State of Michigan
County of Oakland—ss.

Michael H. Feiler, being first duly sworn, deposes and says that he is the attorney for Plaintiff-Appellant herein, that he has prepared and read the attached PETITION FOR REHEARING AND SUGGESTION FOR HEARING EN BANC OR, IN THE ALTERNATIVE, TO CORRECT RECORD OPINION IN THIS COURT, and knows the contents thereof to be true to the best of his knowledge, except as to those matters stated to be upon information and belief, and as to those matters he believes them to be true.

/s/ Michael H. Feiler

Subscribed and sworn to before me this
29th day of November, 1982.

/s/ Kathleen G. Rowe
My Commission Expires Sept. 24, 1984.

OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(City of Allen Park, a Municipal corporation, Plaintiff, v. Ecorse Pollution Abatement Drain No. 2 Drainage District, a body corporate, and Charles N. Youngblood, Wayne County Drain Commissioner, Defendants. Civil Case No. 81-70353)

(Filed July 16, 1981)

On November 6, 1980, following a lengthy trial, I filed an opinion that held that the City of Allen Park contributed to the combined sewer overflows being discharged into the north branch of Ecorse Creek. I found that the defendants, Wayne County Drain Commissioner Charles N. Youngblood, Le Blanc Tile Drainage District, the Drainage District for Ecorse Creek Pollution Abatement Drain No. 1, and the City of Allen Park failed to undertake actions necessary to comply with the construction schedule in NPDES Permit No. MI-0026204, and that this failure constituted a violation of the Federal Water Pollution Control Act § 301(a), 33 U.S.C. § 1311(a), and the Michigan Water Resources Commission Act, MCL § 323.7(1) (MSA § 3.527(1)). I also found that because of Allen Park's refusal to proceed with financing of its share of the project, plaintiffs, the State of Michigan, and the Administrator of the United States Environmental Protection Agency were entitled to injunctive relief compelling the financing and construction of the Allen Park segment of the Element 2 Final Plan, Alternative 1, in its entirety, including contracts 1-5 and a retention basin.

An order so providing was entered, and it required the City of Allen Park to participate with the defendants in specific steps, including the apportioning of the costs of the drain project against certain public corporations, including Allen Park. Jurisdiction was retained to implement the order.

Defendants, in compliance with the order, have taken steps and conducted proceedings to fund and construct the drain project. An apportionment hearing was held, and an apportionment determination was made. Thereafter, and on January 8, 1981, plaintiff, City of Allen Park, filed a complaint for superintending control in Wayne County Circuit Court (Civil Action No. 81-100961-AS) seeking certiorari of those proceedings; this action was removed to this court on February 3, 1981 on pendent jurisdiction grounds.

Issue has not been joined, and defendants move for summary judgment. All parties concede that this is an action seeking superintending control by proceedings in certiorari brought within twenty (20) days after the filing of an order of apportionment.

The statutory procedure for apportionment determination is spelled out in Chapter 20 of the Drain Code of 1956 (a Michigan statute, MSA 11.1483). In *In Re Petition of Macomb Drain Commissioner*, 369 Mich. 641 (1963), 120 N.W.2d 789, the Michigan Supreme Court lists the procedural requirements of Chapter 20 of the Drain Code. They are:

(1) A public hearing on the apportionment of the cost;

(2) Due notice by publication and by registered mail to the public corporations proposed to be assessed;

(3) Following confirmation of the apportionment determination, the Drain Commissioner is required to prepare a special assessment roll; and

(4) After the approval of the assessment roll, the Drain Commissioner is directed to certify to each public corporation assessed, the total amount of such assessment.

The Court points out that proceedings under Chapter 20 of the Drain Code are special and summary.

Pursuant to this statutory directive, defendants, on September 17, 1980, gave notice of and held a meeting at which tentative apportionment of costs were adopted. On November 12, 1980, after due notice, a meeting was held at which a hearing on the tentative apportionment was conducted. This meeting and hearing was recessed to December 10, 1980, when it continued to conclusion. On December 17, 1980 at a meeting of the Drainage Board, objections were considered and further reports were requested. On December 29, 1980, the requested reports were received, objections were again considered and resolutions fixing and confirming the apportionments, together with a Final Order, were adopted by the Board.

I have carefully considered the certified record which has been filed and the objections made thereto by plaintiff. In its statement of objections, plaintiff contends that defendants' motion for summary judgment is deficient, that this Court does not have jurisdiction, and that material issues of fact exist requiring hearing and decision. I find that plaintiff's contentions with regard to defendants' motion's insufficiency and with regard to this court's jurisdiction are without merit.

In analyzing plaintiff's objections, I have in mind that this is a proceeding on certiorari. The review is of the certified record. In the case of *Carroll* v. *City Commission*, 266 Mich. 123, these review proceedings are summarized as follows:

> "On certiorari this court may not review questions of fact. *Brown* v. *Blanchard*, 39 Mich. 790. It is not at liberty to determine disputed facts (*Hyde* v. *Nelson*, 11 Mich. 353), nor to review the weight of the evidence. *Linn* v. *Roberts*, 15 Mich. 443; *Lynch* v. *People*, 16 Mich. 472. Certiorari is an appropriate remedy to get rid of a void judgment, one which there is no evidence to sustain. *Lake Shore & Michigan Southern Ry. Co.* v. *Hunt*, 39 Mich. 469.
>
> "The office of a certiorari is not however to review questions of fact, but questions of law. And in examining into the evidence the appellate court does so not to determine whether the probabilities preponderate one way or the other but that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the appellate tribunal." *Jackson* v. *People*, 9 Mich. 111 (77 Am. Dec. 491).
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> "It is not a flexible remedy. 'All we can do under it is to quash or refuse to quash the proceedings.' *Whitebeck* v. *Common Council, Village of Hudson*, 50 mich. 86."

I find that the hearing on apportionment of costs of the Drain Project was held following notice by publication and mailing, in compliance with law; that the hearing commenced on November 12, 1980 and was adjourned

by public announcement properly made, to December 10, 1980. I find too that the meetings of December 17, 1980, and December 29, 1980, as noticed and held by defendants, were in compliance with law. On December 29, 1980, I find that a Final Order of Apportionment was adopted confirming the apportionment tentatively made on September 17, 1980.

A careful reading of the record also reveals that there are no facts advanced that the Drainage Board, in making the tentative apportionment on September 17, 1980, did not take "into consideration the benefits to accrue to each public corporation and also the extent to which each public corporation contributes to the conditions which make the drain necessary" (Sec. 468 of the Drain Code). Nor are facts set forth that the designation of the area to be served or the designation of the public corporations to be assessed includes or excludes any area in or any public corporation not named in the tentative apportionment. The record contains no facts which demonstrate that the ultimate location and design of the retention basin project mandated by this Court's order will result in a reduction of the apportionment of cost percentage to be borne by the plaintiff as set forth in the Final Order of Apportionment. The record contains factual reports which support the determinations made by defendants, and no countervailing facts were submitted by plaintiff.

Heretofore I found that the drain project was necessary for the public health. This necessity is recited in the petition for the drain project in orders of the Michigan Department of Natural Resources and in the Final Order of Determination entered and filed in the proceedings for the drain project, and all are referenced in the record.

Accordingly, I conclude:

1. These proceedings in certiorari to review the Final Order of Apportionment adopted, executed, entered and filed by defendants on December 29, 1980, and to review the Certified Record of proceedings by the defendants to fund and construct the Drain Project as ordered by this Court in its Final Order and Judgment of June 30, 1980, are before this Court pursuant to the doctrine of pendent jurisdiction, and that I must apply Michigan law to the certiorari proceedings and the standard of review and especially Section 483 of Chapter 20 of the Drain Code of 1956, as amended, which section is operative to the exclusion of any sections in any other chapters of the said Drain Code.

2. The apportionment of costs of the Drain Project are to be made by defendants, according to benefits and contributions by the public corporations involved herein, in percentages of said costs to be borne by each public corporation including the plaintiff, and there is nothing in the Certified Record showing that the defendants did not so apportion the costs in accordance with their best judgment and without mistake or abuse of discretion or fraud or bad faith or in violation of law.

3. In reviewing the Certified Record in these proceedings in certiorari, this Court will not review questions of fact but only questions of law and in examining the facts, this Court will not determine whether the probabilities preponderate

one way or another, but only that the facts considered reasonably justify the Final Order of Apportionment and that the materials available to and used by the defendants in apportioning the costs of the Drain Project are proper and sufficient whether or not this Court would or would not have made the same apportionment.

4. The Certified Record contains proofs, adequate in law, that due and proper notice as required by the Drain Code of 1956, and as required for due process and equal protection of law under Federal and State constitutions, was given by defendants with respect to all hearings and meetings where notice is required or necessary.

5. Defendants' actions to comply with federal and state law, and with the orders of this Court and of the Michigan Department of Natural Resources, by abating water pollution in the North Branch of the Ecorse Creek, the Le Blanc Drain, and other creeks, streams, rivers and drains in the vicinity, provide a benefit to the public corporations which have been apportioned a share of the cost of the drain project, including plaintiff. These actions do not provide a benefit to other public corporations which are not located in this area, and do not contribute to the pollution being abated, except to the degree that all users of the State's water benefit from compliance with water pollution law.

6. The burden rests with plaintiff to show by facts submitted to defendants in the hearing required by law, the reasons why and the extent

and manner in which the tentative apportionments are invalid or improper so as to overcome the presumption that defendants, in exercising their discretion and judgment as required by law, acted properly and in accordance with that law. The plaintiff has not met that burden, and there is nothing in the Certified Record to show fraud, bad faith, dishonesty, abuse of discretion or failure to comply with applicable law on the part of defendants.

7. The Complaint of plaintiff for Superintending Control (certiorari) is dismissed, the petition for issuance of a writ of certiorari is denied, and the writ is quashed and the Final Order of Apportionment, dated and filed December 29, 1980, is hereby confirmed and held not subject to attack in any court.

An order so providing may be submitted.

/s/ John Feikens
Chief United States District Judge

Dated: July 15, 1981
Detroit, Michigan

ORDER DISMISSING COMPLAINT FOR SUPERINTENDING CONTROL

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed August 20, 1982)

(City of Allen Park, A Municipal Corporation, Plaintiff, vs. Ecorse Pollution Abatement Drain No. 2 Drainage District, A body corporate, and Charles Youngblood, Wayne County Drain Commissioner, Defendants. Civil Action No. 81-70353)

At a session of said Court held in the United States District Courtroom, Eastern District of Michigan, Southern Division, this 20th day of August, 1981.

PRESENT: HONORABLE JOHN FEIKENS, CHIEF JUDGE

Plaintiff, CITY OF ALLEN PARK, having filed its Complaint for Superintending Control (Certiorari), Defendants ECORSE POLLUTION ABATEMENT DRAIN NO. 2 DRAINAGE DISTRICT, and CHARLES N. YOUNGBLOOD, Wayne County Drain Commissioner, having filed responses thereto, the matter having been duly heard and this Court being otherwise fully advised in the premises;

NOW, THEREFORE, IT IS ORDERED, that Complaint of Plaintiff for superintending Control (Certiorari) is dismissed, the petition for issuance of a writ of certiorari is denied and the writ is quashed.

IT IS FURTHER ORDERED that the Final Order of Apportionment dated and filed December 29, 1980, is hereby confirmed.

/s/ John Feikens
Chief United States District Judge

Note: Allan Glass, counsel for Allen Park, has seen this order and approved it as to form only.

MOTION FOR DISQUALIFICATION PURSUANT TO 28 USC § 455(a)

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed June 9, 1981)

NOW COMES Plaintiff herein, City of Allen Park, by and through its attorneys, Pagnucco & Kruse (per Kenneth D. Kruse) and Feiler and Glass, P.C. (per Michael H. Feiler), and respectfully moves this Honorable Court to enter its Order of disqualification and reassignment to another judge of the Eastern District Court pursuant to 28 USC § 455(a) and in support whereof, respectfully shows unto this Honorable Court the following:

1. That this motion is being brought pursuant to 28 USC § 455(a) providing for the disqualification of any judge of the United States where the impartiality of that judge might reasonably be questioned.

2. That such standard for determining when impartiality might reasonably be questioned in an objective standard and that where the question is close,

the judge whose impartiality might reasonably be questioned must recuse himself from the trial. See *e.g. Roberts* v *Bailar* (6th Cir, 1980) 625 F2d 125.

3. That during the proceedings from and after the filing of this present cause and its removal to this Honorable Court, this Honorable Court has evidenced certain indicia sufficient to raise a reasonable doubt on the part of reasonable observers as to the lack of impartiality as to this Honorable Court sufficient under the tests of 28 USC § 455(a) and the decision in *Roberts* v *Bailar*.

4. That the indicia of lack of impartiality center on various actions by this Honorable Court and certain comments on the record indicating that such lack of impartiality is directed against Plaintiff, City of Allen Park and in favor of Defendant Wayne County Drain Commissioner and its legal counsel, Mr. Charles Moon.

5. That pursuant to the tests enunciated by the Sixth Circuit under 28 USC § 455(a) actual lack of impartiality is not material to this motion but rather, this motion turns on the indicia of lack of impartiality which might cause a reasonable and objective observer to doubt or question the impartiality of the Court in this cause.

6. That indeed, various indicia appearing in the record of this cause do raise substantial doubts as to the appearance of impartiality. Such indicia are contained in the exhibits set forth herein and are referenced more specifically as follows:

a. That in response to several letters from citizens of Allen Park having been directed to this Honorable Court, this Court did prepare and send a letter to several of the Allen Park citizens. This letter indicated

that the real problem was Allen Park having been in favor of this project in the past and now apparently attempting to change its mind. This recital by the Court was obviously an advocative position and indeed one taken by Plaintiff at the time of trial. It failed to point out to the citizens that since the initial endorsement by Allen Park many factors had been learned and that the costs had escalated in a dramatic fashion. Such letter did not attempt to portray a neutral, impartial recounting of the various matters which had transpired in the original case, being entitled Department of Natural Resources, et al v City of Allen Park, et al, Docket No. 79-74681.

b. Said letter, as referenced above, had attached to it what purported to be a chronology of events up to the time of said letter. Pursuant to the transcript indication by this Honorable Court, such chronology was prepared by a representative of the Drain Commissioner and obtained by the Court outside the normal course of proceedings through such extra-judicial contact with said representative of the Drain Commissioner, a party in this case obviously hostile and adverse to the City of Allen Park. That such comments with regard to the aforesaid letter and attached chronology are found at pages 16 and 17 of the transcript of proceedings before this Honorable Court on Wednesday, May 20, 1981, during a post-judgment motion in Docket No. 79-74681, copies attached hereto.

c. That during said hearing on May 20, 1981, this Honorable Court made further remarks with regard to the public officials of Allen Park (pages 35-36) indicating the Court's feeling that the citizens of Allen

Park are simply confused for want of leadership, such remarks not being germane to any matters then before the Court and certainly raising questions as to the Court's impartiality toward the issues raised by Allen Park in this present action challenging apportionment.

d. That during the hearing of May 20, 1981, this Honorable Court made certain statements with regard to Mr. Charles Moon, counsel for the Defendant Drain Commissioner found at pages 36-38 of the transcript of said hearing indicating the Court's belief that whatever role Mr. Moon did play in these proceedings he would not have permitted the Court to act improperly. Mr. Moon, in this present action, was an intimate advisor to the Drain Board and intimately concerned with the very actions which are being challenged in this apportionment case and such remarks and comments certainly call into question the impartiality of this Honorable Court in reviewing this case on its merits in view of such comments with regard to the apparent infallibility of Mr. Moon.

7. That this motion is being made pursuant to the statutes so providing for reason, among others, that this case and related matters have been subjected to a great deal of public scrutiny and concern and that the appearance of justice in this cause is as important as the actual doing of justice but that to any reasonable observer, such comments and actions as set forth herein may well call into question the impartiality of this Honorable Court in passing upon the merits of the matters presently pending before it in this cause as well as other matters dealing with this proposed sewer separation and retention basin project.

8. That this present motion is made pursuant to statute without any intent or desire to hinder or delay these proceedings but rather, to carry out the mandate of Congress under 28 USC § 455(a) and the dictates of the Sixth Circuit Court of Appeals as set forth in *Roberts* v *Bailar, supra,* with no intent to embarrass any of the parties hereto, this Honorable Court, or any participating counsel.

WHEREFORE, Plaintiff, City of Allen Park, respectfully prays this Honorable Court will grant its motion for removal based upon the appearance of reasonable question as to impartiality and that this Honorable Court will see fit to reassign this matter to another judge of this Court.

Respectfully submitted,

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Dated: June 9, 1981

MEMORANDUM IN SUPPORT OF MOTION FOR DISQUALIFICATION PURSUANT TO 28 USC § 455(a)

28 USC § 455(a) is addressed as much to the appearance of justice as it is to actual justice or impartiality. In this respect subparagraph (a) is to be differentiated from subparagraph (b), the latter actually requiring some indicia of bias, prejudice or actual favoritism in a cause. The Sixth Circuit Court of Appeals has made this distinction clear in the recent case of *Roberts* v *Bailar* (6th Cir, 1980) 625 F2d 125. *Roberts* was a complaint alleging sexual discrimination by plaintiff's superiors at the Knoxville, Tennessee Post Office. At a pretrial hearing the district judge granted a motion to dismiss Knoxville Postmaster C. Edwin Graves as a defendant and to substitute the Postmaster General of the United States. In the pretrial hearing, the district court had apparently made a remark to the effect that he knew Mr. Graves and "he is an honorable man and I know he would never intentionally discriminate against anybody." 625 F2d at p. 127. A request was made of the district court to recuse itself because of this remark but the court felt that it was "confident of its ability to conduct a fair trial of the merits of this case" and therefore declined to recuse itself. (625 F2d at p. 128). The court of appeals found that to the extent the motion was brought under 28 USC § 144 (being based on actual bias or prejudice) the affidavit signed only by counsel for party was inadequate. However, the court of appeals went on to state that the district court had an independent duty to recuse himself under 28 USC § 455(a). The court of appeals stated:

> "Section 455(a) is a self-executing provision for the disqualification of federal judges. There is no

> particular procedure that a party must follow to obtain judicial disqualification under § 455(a). Instead, the section sets forth a mandatory guideline that federal judges must observe *sua sponte*." (625 F2d at p. 128)

The Sixth Circuit went on to point out the changes affected by subrule 455(a). Formerly, such a determination by the trial court could be based upon the subjective determination of the trial court as to his own belief in fairness of proceeding with the case. The court pointed out that the standard is now objective and must turn on what a reasonable person knowing all the relevant facts would think about the impartiality of the judge. The court stated specifically:

> "If there is a reasonable factual basis for doubting the judge's impartiality, the congressional committee reports on the 1974 amendment to § 455 explain, the judge should disqualify himself and let another judge preside over the case. Even where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial."

In *Roberts*, the Postmaster, Mr. Graves, was intimately connected with many of the personnel policies and decision-making processes which led to the complaint of the plaintiff. The Sixth Circuit indicated that although Mr. Graves was at least responsible in part for some of the employment decisions which were the subject of the suit, that once the district judge expressed his sentiments about Mr. Graves' character, the objective appearance of impartiality vanished.

In this present cause, this Honorable Court has made various comments concerning the leaders of Allen Park and moreover, has made certain comments concerning the certainty of the Court's belief in Mr. Moon's correctness. The specific comment by the Court that:

> "I [the Court] am satisfied, looking back at the role that you [Mr. Moon] did have, and I am satisfied that no matter what the situation was, if you didn't think I could properly act you would have advised me, notwithstanding whatever the result of that would have been."

This comment was made as part of a dialogue which occurred at the hearing before this Court on May 20, 1981, where it was pointed out to the Court that Mr. Moon should not be considered an *amicus* in this case since he is indeed a paid legal representative on behalf of the Defendant Drain Commissioner. Indeed, the pleadings filed on behalf of Allen Park indicate that Mr. Moon was, in fact, being paid by the Drain Commissioner during the entirety of these proceedings even though part of the remuneration was involved with consultation in parties obstensibly hostile and adverse to the Drain Commissioner in the trial of the first case. Mr. Moon's presence in this case is as a paid legal representative. However, the comments by the Court place Mr. Moon in a significantly greater stature than other counsel on behalf of Allen Park or indeed, other parties in this cause. But such comments go not merely to the presence of Mr. Moon as a counsel, since Mr. Moon is also intimately involved with the Drainage Board decision which is the very subject matter of this suit. During all the apportionment hearings Mr. Moon served as an intimate legal advisor, sitting with the

Drainage Board, and no doubt played a significant role in actually assisting the Board in formulating the very apportionments which are called into question in this case. The Court's comments that Mr. Moon would never lead the Court astray certainly create an aura of lack of impartiality since one might also presume the Court to believe that Mr. Moon would never lead the Drainage Board astray and therefore, the apportionments must obviously be correct.

Such an appearance of lack of impartiality is at least as great here as in the *Roberts* decision. Certainly, the events which have transpired since the filing of this present cause would well cause a reasonable observer to at least question the impartiality of this Court within the meaning of § 455(a) and the *Roberts* decision.

Wherefore, Plaintiff respectfully prays that this Court grant its annexed motion for disqualification.

Respectfully submitted,

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Dated: June 9, 1981

LETTER FROM COURT
TO ALLEN PARK RESIDENTS
(with attached chronology)

February 13, 1981

I acknowledge your recent letter regarding the matter of the Sewer Separation and Retention Basin for the City of Allen Park.

I have secured a calendar of events from the Office of the Wayne County Drain Commissioner which sets forth a history of the events that have taken place with regard to the sewer separation from 1968 to 1981.

What it is important to note is that until recently the City of Allen Park, its officials and citizens have been actively working to obtain separation of the combined sewer system with a sanitary retention basin.

Yours very truly,

/s/ John Feikens
Chief Judge

CHRONOLOGY

1970 (November) Water Resources Commission held hearing at which all communities within the Ecorse Basin were directed to abate pollution. Communities, including Allen Park, requested Henry V. Herrick, Wayne County Drain Commissioner, to prepare a report to recommend corrective action.

1971 (November) Phase I report issued which considered separation of combined sewers with retention.

1972 (October) Phase II report issued which considered

treatment of combined overflow rather than separation. No Federal grants available at this time.

1973 (June) Department of Natural Resources (DNR) held meeting in Lansing with Charles N. Youngblood, Wayne County Drain Commissioner, and offered grant to allow preparation of study to comply with new Federal Act 92-500 which provides 75% Federal funding with 5% State funding.

1974 (December) Study submitted to public hearing for comment. Study addressed both flooding and pollution abatement. Hearings held in Taylor, Lincoln Park and Allen Park City Halls.

1976 (January) Environmental Protection Agency (EPA) issued regulation reducing funding to only pollution abatement portion of multi-use projects.

1976 (May) City of Allen Park officials, with Charles N. Youngblood, met in Washington with EPA representatives to secure funding for project to correct pollution problems.

1976 (June) City of Allen Park officials with Charles N. Youngblood met with EPA and DNR representatives in Lansing to formulate how to complete study and obtain Federal Funds.

1976 (August) City officials from Allen Park, Taylor, Dearborn Heights and Lincoln Park met at Taylor City Hall with representatives from Charles N. Youngblood's office and requested separation of combined sewers with retention be the selected alternative.

1976 (December) Public hearing held in Allen Park at which the alternative offering separation and retention was requested by the participants including City of Allen Park officials.

1977 (June) City of Allen Park petitioned Charles N. Youngblood, Wayne County Drain Commissioner, to create a drainage district to construct separation project with sanitary retention basin.

1978 (April) Apportionment hearing held in Allen Park City Hall on project including separation in Allen Park and retention basin for Allen Park. Allen Park officials didn't object to apportionment.

1978 (August) City of Allen Park filed lawsuit to stop project which included separation and retention basins in Allen Park.

1978 (September) Reapportionment hearing held at Allen Park City Hall on reduced scope project not including Allen Park separation or retention basin. Allen Park officials approved apportionment.

1978 (December) City of Allen Park withdrew lawsuit on project which allowed bonds to be sold to finance separation and retention basins not within the City of Allen Park.

1979 (December) Lawsuit filed in Federal Court against Allen Park and Charles N. Youngblood, Wayne County Drain Commissioner, to force correction of pollution problem in the Ecorse Creek.

1980 (November) Federal Court ordered Allen Park and Charles N. Youngblood, Wayne County Drain Commissioner, to proceed with correction of pollution problem through construction of separation of sanitary and storm sewers and construction of sanitary retention basin.

1980 (December) Apportionment hearing held in Allen Park City hall on project ordered constructed by Federal Court.

1981 (January) Hearing held in Allen Park City Hall on location of proposed sanitary retention basin ordered built by Federal Court Order.

PORTIONS OF TRANSCRIPT OF HEARING
MAY 20, 1981

* * *

(16) * * * The Court: The only merit that I see in Mr. Emery's suggestion over and above the two orders is that if you want a clarification in the form of an additional order that says, "Without delay" — whether this communicates it correctly or properly or not — "that this site selection must be accomplished by or before June 5th," I will enter such an order simply to put the parties who are to obey it then in a position to know that if they don't I will take the next step.

I think there is too much foot dragging in this case. I have a rather substantial file. I don't think this is any news to any of you, but I have correspondence from a lot of the people of Allen Park who believe that when they write letters to a Federal Judge it's like writing letters to a Congressman or a Senator or to the Governor. It is not. It is a different office entirely.

But I did something that I have never done before, and that is, I wrote a letter to the people that up (sic) that time had written to me. And I asked Mr. Tiplady, in order to prepare that letter, to give me a (17) chronology of what had occurred in the past. Because you will remember that in the trial of this case there was substantial proof that up to a certain point in time the public officials of Allen Park were as eager for this project as anybody else. Congressmen were interceding to get the Environmental Protection Agency to move. Everybody wanted the golden spigot turned on.

But now that it becomes necessary for the citizens of Allen Park to bear their share of the burden, their 20 percent, now they want to undo everything.

Now, a United States Court cannot be subject to that kind of political pressure. And I would hope that the

Drain Commissioner and everybody here understand that I mean business. If I have erred, Mr. Feiler will see to it that my error is corrected in Cincinnati, and that is as it should be, and that process is under way. But I think Mr. Feiler is completely correct in his motion papers in pointing out to me as he did, that this is not Allen Park's problem. This is the Drain Commissioner's problem, and the Drain District's problem.

Mr. Tiplady, I know Mr. Youngblood is in court here but I don't know whether the other members of the board are. But they had better get moving. Either that or I am going to get the impression that maybe Plaintiffs were not very sincere about this litigation to begin with.

* * *

(33) * * * The Court: Well, I don't see any need for the taking of any testimony with regard to this. Does anyone see that differently?

Mr. Emory: No, Your Honor.

The Court: Therefore, any of the subpoenas will not be used, and I guess that's mooted out.

Mr. Feiler: Thank you, Your Honor.

Your Honor, I have one other request and it does refer to Mr. Moon, and I can tell the Court quite frankly I approach it somewhat sensitively because I have the greatest respect for Mr. Moon's credentials and ability. But Mr. Moon keeps portraying himself as an amicus in this case, and gave an address as a Master in Chancery.

Mr. Moon is a very fine attorney and I think he should be acknowledged as one of the attorneys for the Drain Commissioner and present his arguments as arguments of Counsel. I think that's what the facts would establish, that he is indeed, attorney for the Drain Commissioner and has represented him throughout the proceedings. And I just don't want any greater stature for one counsel in this case than the other. We are all attorneys of record

and the arguments that we present as either officers of the court or whatever else we may be, we are all attorneys presenting arguments —

(34) The Court: Well, that may be. Mr. Moon was admitted, though, as an amicus for the purpose of this case.

Mr. Feiler: Again, it is not something I want to make any issue of, but to clear it up. Mr. Moon was being paid for representation on behalf of the Drain Commissioner, which certainly we are all being paid for representation. But I think to portray oneself as an amicus when one is in effect, representing a party, it could be potentially confusing to someone looking at this record. And it seems to me that where a person is making arguments on behalf of a client he should be acknowledged as an attorney of record, and I certainly have no problem with Mr. Moon's acknowledgment as an attorney of record.

The Court: I don't have any difficulty with it. Mr. Moon is a respected member of this Court. He testified at length at the trial. He does have a position here as an amicus. It is very well known that he was very well informed in this whole area, perhaps more so than any other individual, and I am not sure just what the thrust of your point is.

In one of your papers I read that another individual — Who was it, Mr. Trimm?

Mr. Feiler: Mr. Trimm.

The Court: What was his name?

(35) Mr. Feiler: Mr. Don Trimm.

The Court: Yes, there was criticism, I think, by your client of his position.

Mr. Feiler: Not of his position —

The Court: But wasn't it a fact that at one time he worked on behalf of the City of Allen Park?

Mr. Feiler: No, Your Honor. He was always strictly working for the Drain Commissioner.

The only thing we were attempting to show is that the Court should not be led into a broader position when it became obvious at the trial that the Drain Commissioner was paying for consultation with the Plaintiffs with the very people who were suing him.

The Court: You know what the real problem in this case is? The real problem is not that nor is it the real problem that I will be led astray by anything that Mr. Moon would say. And I don't think Mr. Moon would ever want to lead me astray. I don't think he is that kind of a person.

But to get really down to the problem here, the mischief in this case is that the public officials, the leaders of Allen Park, the people who helped make this decision some years ago, where are they now? Where are they now, the people that implored the grant of Federal funds for this project?

(36) Allen Park, as you know, was an enthusiastic supporter of this project. Where are these leaders of yesterday? Now, I can understand why people are confused. They have no leaders. Well, it is easy now to say: "We don't care about a little pollution in our back yard if we don't have to pay some more taxes." But the real mischief here, the real difficulty here is that these people who decided these things after public hearings in Allen Park — the record has been made — their voices are not raised. Do they still live in Allen Park?

Mr. Feiler: I can't answer that for you, Your Honor.

The Court: Do you know where they are?

Mr. Feiler: No, Your Honor.

The Court: Mr. Moon.

Mr. Moon: I do think I should inform the Court that my attitude in this matter has changed since the earlier trial of this matter and the issuance by Your Honor of the final order and judgment, that I was then retained again by the Drainage District for the purpose of carrying out

the proceedings necessary to finance the second segment of the original Facility Plan Element 1 or Element 2 — I forget the numbers now — so that I have been engaged in carrying on meetings with the Drain Board and hearings with the Drain Board, and I attended the hearing on the retention (37) basin which is not a hearing required by the Drain Code but it is a hearing which is a step in obtaining the grant funds and the totality of the financing —

The Court: Mr. Moon, you don't have to defend yourself in this Court. The record is clear, I think, and I have no difficulty with it.

Mr. Moon: Thank you.

The Court: If I misspoke in saying that you don't have to defend yourself in this court, I retract that. What I meant by that is that I don't have any problem with it and I am sure you don't.

Mr. Moon: My job in carrying out financing of this facility, if it is to be financed, requires a combination of carrying out the local shares, a substantial portion of which is the responsibility of the City of Allen Park, and in returning and getting in hand the grant contract for the grant procedure. The retention basin is one part of the grant that is unsettled. Therefore it is — to me as counsel it is necessary to know the grants will come in the full amounts and the local shares will come in the full amounts.

The Court: I am satisfied, looking back at the role that you did have, and I am satisfied that no matter what the situation was, if you didn't think I could properly act you would have advised me, notwithstanding whatever the result of that would have been.

(38) Mr. Moon: That's correct.

The Court: I am satisfied. We will meet next Tuesday at 2:00 o'clock.

Mr. Feiler: Thank you, Your Honor.

Mr. Friedman: Thank you, Your Honor.

LETTER FROM COUNSEL TO COURT

LAW OFFICES
FEILER AND GLASS, P.C.

MICHAEL H. FEILER
ALLEN E. GLASS

QUAKERTOWN PLAZA
32969 HAMILTON COURT
SUITE G 100
FARMINGTON HILLS, MICHIGAN 48018
(313) 553-9300

June 2, 1981

Honorable John Feikens, Chief Judge
U.S. District Court
U.S. Courthouse, 231 Lafayette Blvd.
Room 730
Detroit, MI 48226

RE: Case No. 81-70353
City of Allen Park v. Wayne County
Drain Commissioner, et al

Dear Judge Feikens:

After careful consideration and consultation among counsel, we have reached the difficult conclusion that a motion under 28 USC § 455 is in order. Our review and consultation has been based upon recent events which have occurred on the record in these proceedings which we believe in good faith justify such a motion. Indeed, I would feel somewhat remiss in failing to bring this motion and to have these various matters aired.

Toward this end, we have ordered transcripts of the most recent proceedings before Your Honor and hope to have these in the very near future. In order to avoid any possible misstatements, we believe that these transcripts should be obtained and reviewed prior to the time any such motion is brought. However, Your Honor has scheduled the hearing on pending motions in this matter

for Tuesday, June 9, 1981, and there is a possibility that transcripts will not have been obtained in sufficient time to allow the § 455 motion to be heard prior to the June 9th hearing date. From and after receipt of the transcripts, we would require no more than two or three days in which to prepare our motion and would be willing to have it heard at the Court's earliest opportunity.

Since such a motion may well result in the removal of this cause from Your Honor, I respectfully suggest a postponement of further proceedings in this case until such time as this motion may be properly filed and aired. This request is made after considerable deliberation and soul-searching with no intent whatsoever to create unfairness to Your Honor or any of the other parties. We believe such a motion to be warranted by the record in this cause and feel a duty-bound obligation to our client, the City of Allen Park, to have our conclusions presented and heard pursuant to this code section.

The indulgence of Your Honor in this request would be most greately appreciated.

Respectfully yours,

FEILER AND GLASS, P.C.

MICHAEL H. FEILER

MHF/kr
cc: Charles R. Moon, Esq.
Robert P. Tiplady, Esq.
Kenneth D. Kruse, Esq.

REPLY LETTER

United States District Court
For the Eastern District of Michigan
730 Federal Building
Detroit 48226

Chambers of
JOHN FEIKENS
Chief Judge

Michael H. Feiler, Esq. June 3, 1981
Feiler and Glass, P.C.
Quakertown Plaza
32969 Hamilton Court, Suite G100
Farmington Hills, Michigan 48018

Re: Case No. 81-70353 City of Allen Park
v. Wayne County Drain Commissioner, et al

Dear Mr. Feiler:

I acknowledge receipt of your letter of June 2, 1981.

I do not believe that it would be in the interests of justice to reschedule the hearing on the pending motions in this matter, scheduled for Tuesday, June 9, 1981. Even if the transcripts which you have ordered are not obtained in sufficient time to allow a § 455 motion to be heard prior to the June 9 date, and I do not see how that is possible on my schedule in any event, there is an alternative.

I will proceed with the June 9 hearing and if, subsequently, as a result of your motion seeking my recusal and should that occur, any decision which has been made as a result of the June 9 hearing can be vacated.

Yours very truly,

/s/ John Feikens
Chief Judge

cc: Charles R. Moon, Esq.
Robert P. Tiplady, Esq.
Kenneth D. Kruse, Esq.
Abba I. Friedman, Esq.
Timothy Downs, Esq.
Lawrence O. Hinkle, Esq.
Jeffrey Supowit, Esq.
Thomas Emery, Esq.
Jay E. Brant, Esq.

AFFIDAVIT OF MICHAEL H. FEILER

State of Michigan —
County of Oakland — ss.

Michael H. Feiler, being first duly sworn, deposes and says that he is one of the attorneys for Plaintiff herein, that he has prepared and read the attached Motion for Disqualification Pursuant to 28 USC § 455(a) and Memorandum in Support, and knows the contents thereof to be true to the best of his knowlede, except as to those matters stated to be upon information and belief, and as to those matters he believes them to be true.

FEILER AND GLASS, P.C.
Attorneys for Plaintiff

BY: /s/ MICHAEL H. FEILER (P13340)
32969 Hamilton Court, Suite G 100
Farmington Hills, MI 48018
(313) 553-9300

Subscribed and sworn to before me
this 9th day of June, 1981

/s/ KATHLEEN G. ROWE
Notary Public, Oakland County, MI
My Commission Expires Sept. 24, 1984

PROOF OF SERVICE

State of Michigan —
County of Oakland — ss.

Michael H. Feiler, being first duly sworn, deposes and says that on the 9th day of June, 1981, he did cause to be served (by first class mail) a copy of the attached Motion for Disqualification Pursuant to 28 USC § 455(a), Memorandum in Support of Motion, Affidavit upon:

Robert Tiplady, 711 Ann Arbor Trail, Plymouth, MI 48170;
Charles R. Moon, 800 First National Building, Detroit, MI 48226;
Hon. John Feikens, Chief Judge, Eastern District of Michigan, U.S. District Court, 231 Lafayette Blvd., U.S. Courthouse, Room 730, Detroit, MI 48226.

/s/ MICHAEL H. FEILER

Subscribed and sworn to before me
this 9th day of June, 1981.

/s/ KATHLEEN G. ROWE
Notary Public, Oakland County, MI
My Commission Expires Sept. 24, 1984

ORDER DENYING MOTION FOR RECUSAL

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed July 14, 1981)

(City of Allen Park, a Michigan municipal corporation, Plaintiff, vs. Ecorse Pollution Abatement Drain No. 2 Drainage District, a body corporate and Charles N. Youngblood, the Wayne County Drain Commissioner, Defendants. — Case No. 81-70353)

Plaintiff City of Allen Park having filed its Motion for Recusal pursuant to 28 USC § 455(a) and the motion having come on for hearing before this Court on June 30, 1981, and after arguments of counsel were heard and an opinion rendered by this Court at the time of said hearing;

IT IS, THEREFORE, ORDERED that said Motion for Recusal be and the same is hereby denied.

/s/ John Feikens
U.S. District Court Judge

APPROVED AS TO FORM:

BY: /s/ MICHAEL H. FEILER
Attorney for Plaintiff

TRANSCRIPT OF PROCEEDINGS
OF MAY 20, 1981

(United States District Court
Eastern District of Michigan
Southern Division)

(State of Michigan, the Administration of the United States Environmental Protection Agency, Greenfield Construction Company, Inc., Lanzo Construction Company, Inc., Giannetti Construction of Michigan, Inc., and Rocco Ferrera & Company, Inc., Plaintiffs, vs The City of Allen Park; The Le Blanc Tile Drainage District; The Drainage District for Ecorse Creek Pollution Abatement Drain No. 1; The County of Wayne; Charles N. Youngblood, the Wayne County Drain Commissioner, Defendants. — Civil Action #9-74681)
(State of Michigan and Robert Lindisch, Plaintiffs, vs The City of Allen Park, Michigan, a Municipal Corporation, Defendant. — Civil Action #9-74682)

Proceedings had in the above-entitled cause before the HONORABLE JOHN FEIKENS, Chief United States District Judge, at Detroit, Michigan on Wednesday, May 20, 1981, commencing at or about the hour of 2:00 P.M.

Appearances: Thomas J. Emery, Esq., Assistant Attorney General, appearing on behalf of the State of Michigan; Karl R. Overman, Esq., Assistant United States Attorney, appearing on behalf of the United States Environmental Protection Agency; Abba I. Friedman, Esq. and Laurence A. Berg, Esq., appearing on behalf of Greenfield Construction Company, Lanzo Construction Company, Giannetto Construction Company of Michigan and Rocco Ferrera Construction Company; Michael H. Feiler, Esq., Allen I. Glass, Esq. and Kenneth

Kruse, Esq., appearing on behalf of the City of Allen Park; Robert P. Tiplady, Esq. and Charles Moon, Esq., appearing on behalf of the Le Blanc Tile Drainage District, The Drainage District for Ecorse Creek Pollution Abatement Drain No. 1, and Charles N. Youngblood.

(4) Detroit, Michigan
Wednesday, May 20, 1980
About 2:00 P.M.

The Clerk: Civil Action 79-74681, The State of Michigan v. The City of Allen Park.

The Court: Now, do I understand that before I address the main motion there is an ancillary motion on a subpoena?

Mr. Feiler: Yes, Your Honor.

Your Honor, Michael Feiler, appearing on behalf of the City of Allen Park.

Yesterday I was notified that a subpoena was served on Mr. Frank Lada from the City of Allen Park to appear at this motion this afternooin. We filed a motion to quash the subpoena setting forth the reasons basically, Your Honor, that — First of all, my conversation with Mr. Emery, it would appear that Allen Park is not a true protagonist within the context of this present motion; that the subpoena was served only yesterday morning even though the motion was pending for some time; and it appears unduly oppressive and untimely.

Furthermore, I have been attempting to find out what kind of testimony would be required of Mr. Lada who, by the way, is not a full-time mayor but holds (5) a full time job with the Ellery Sign Company. And as near as anyone can tell me it is to assure that they get accurate information here today. Well, it appears to me that this is the function of myself and Mr. Kruse.

Your Honor, Mr. Lada is not here. He is on notice of 15 minutes on the motion to quash.

The Court: Well, I certainly will take into account that — the matter that you have raised. Perhaps we will put that aside for a moment to see whether it is necessary for any testimony to be taken.

Mr. Feiler: Thank you, your Honor.

The Court: I now pick up the State's motion — and let me ask you this, Mr. Emery.

While your motions asks me — I am reading from your motion now — your motions asks me to order the Defendant, Charles N. Youngblood, The Drainage District and the LeBlanc Tile Drainage District to complete the appropriate site selection.

I wonder just what kind of motion it is. Are you asking me to hold these different parties in contempt?

Mr. Emery: No, I am not, your Honor. The purpose of the motion, as the Court will recall —

The Court: Well, let me finish. And in the final order and judgment dated almost a year ago, the 30th of June, about a month ago, almost, paragraph D says: (6) "It is further ordered and adjudged that the Defendant Drain Commissioner and the Drainage District aforesaid shall immediately proceed to locate and obtain appropriate MDNR and EPA approval and to redesign and construct the projected retention basin as defined in the Element 2 Facility Plan — "

Why is there this foot-dragging?

Mr. Emery: My view, Your Honor, was while the order required them to do that without a date certain by which this action had to be taken, that the Drain Commissioner, because of the nature of the conversations arising over the retention basin problem would find it difficult if there were not a specific date certain set for them to make the site selection so that the rest of the procedure can go forward.

The Drain Commissioner and the other parties did that up to a point. They prepared a Facility Plan document;

they held hearings with respect to the Drainage Board hearings with respect to the project. But when it came time to choose a particular site within the City of Allen Park, it seems to the State that the process stopped. And what is needed to kick in, so to speak, in motion the rest of the process which has only partially been conducted, was the requirement that the Drain Commissioner and the Drainage (7) Commissioner and the Drainage Board pick their site that they want so that the State and EPA processes can then pick up from that point. That's why I felt a date certain would give us a specific benchmark to work from in assuring the project goes forward.

The Court: Well, it's a puzzle to me. If you recall, a year ago I was beseiged by lawyers to take this matter up. It had to be handled; it had to be processed. It was taken on an emergency basis.

I said at the end of the hearing, which was on an expedited basis, the Drainage Commissioner shall forthwith — and that means to me immediately.

Now, what was it that suddenly changed the situation of urgency that had been in the case before that? I can completely understand why Mr. Feiler is not going to rush around and try to get the Drain Commissioner to select a site. He has been opposed to it. But what about EPA and MDNR, the regulatory agencies? Why have you been waiting around for almost a year while the Drainage Commissioner has been, as you say, dilatory?

Mr. Emery: Well, I don't think the Drain Commissioner has been dilatory during the period of June until December. But, when the end of December came, when they had the Facility Planning documents, which is another fairly thick one, where the public hearings had been (8) held and the local input had been put in and then we just waited for them to pick the site and they didn't seem to do it.

The Court: Why didn't you start after them until January? Why did you wait until May?

Mr. Emery: The public hearing was the end of January. There were some discussions back and forth between the Hearing Commissioner and the State. Inquires were made by the State as to when they were going to make the decision, and we filed the motion in April. I think it was during March that I became aware of what was going on in terms of the fact that all the public hearings had been held and the Facility Plan was in, but what we expected to be the next step never came.

The Court: Well, "Forthwith" means immediately, doesn't it?

Mr.Emery: That would be my interpretation.

The Court: Is it your suggestion that I say now, "Immediately but no later than blank day or blank month?"

Mr. Emery: It is my understanding that the Drainage Commissioner, on behalf of the Drainage Board, has indicated that they will make a site selection by June 5th.

The Court: By when?

(9) Mr. Emery: By June 5th.

The Court: Is it necessary for me to order that?

Mr. Emery: I think so.

The Court: Why? I have ordered it twice.

What about it, Mr. Tiplady? Why do I have to order your client to do twice what I said he should do?

Mr. Tiplady: Your Honor, it is not as easy as setting a date that the Drainage Board must make their decision. It is our position that on all previous occasions when the Drainage Board has met, the City of Allen Park has come forward and raised objections to the Board making a decision, any decision. Those objections, in our opinion, contradict the order of the Court and the judgment of the Court, and we have asked on today's date that Allen Park come forward and raise these objections to the Court.

The Court: Why to me? The Drain Commissioner is being paid to do this job. Why doesn't he do it?

Mr. Tiplady: Well, the Drain Commissioner by himself is only one member of the board —

The Court: No, no. You obtained, as a result of a hard-fought trial in this case, a judgement that (10) required that your client go forward. The order says "forthwith." I did not stay the order. As far as I am aware the Court of Appeals did not stay the order. There is no reason whatever for the Drain Commissioner not to do his job. What does he want me to do? Does he want me to do his job for him?

Mr. Tiplady: No, Your Honor.

The Court: Does he want me to pick the site?

Mr. Tiplady: No, Your Honor.

The Court: Why doesn't he go out and do it?

Mr. Tiplady: The Drainage District will make that decision before June 5th.

The Court: Well, if he doesn't, I think I am beginning to wonder whether or not the Drain Commissioner is not in contempt of this Court.

Mr. Tiplady: On previous Drain Board meetings, the Drain Commissioner has supported the selection of a retention basin site on each hearing. There has been a change in the personnel and the new members of the board were not privy to the previous public hearings and previous objections, and it took some time for them to digest the information. Likewise, when the Board would meet, alternatives — and on two occasions an alternate was in place of the permanent (11) board member. So, it has been difficult to get together those board members who have the information on the selection of a site. And they are now in a position to make a decision.

The only reason why we ask for the June 5th date is that the principal site that we believe is best for the

community and the least costly, is property owned by the Detroit Water Board, and they have asked that they have until next week to give us a tentative opinion as to whether or not that site is available. We don't want to have to pick a site and go back and reevaluate and pick another site. We want to pick a site that there is the strongest likelihood that we can secure, and it is the Drainage District's decision that they will make a decision before June 5th.

The Court: Is that satisfactory to you, Mr. Emery?

Mr. Emery: Yes, it is, Your Honor. I would point out, one of the purposes of setting a date in light of the Court's previous comments, I believe we have a date certain and should there be noncompliance, I believe Plaintiffs are in a better position in terms of any contempt proceeding or proceedings pursuant to Rule 70. So, that's one of the reasons why I would like to have a date certain as well.

The Court: Mr. Friedman.

Mr. Friedman: Your Honor, I appreciate (12) your recognizing me. I have attended many of the Drainage Board meetings. I have not attended all of them. I have seen the tenor of the meetings, and as Mr. Tiplady indicated, aside from Mr. Youngblood, there are two other members of the Drain Board, and from the time of our trial and the proceedings that occured the first of the year, the two members other than Mr. Youngblood have changed, and I have heard — One of the members said at the meeting that he wasn't a member of the board at that point and that he doesn't feel that he is bound.

And one of the reasons that we joined in the motion is to ask the Court to direct those other two individuals as well, so they recognize that they have a duty to act.

I recognize that I am in a position, "Adverse" to Mr. Youngblood —

The Court: Wait a minute. Let's not spend time on that. Is that a live issue?

Mr. Tiplady: Yes, I believe that the present —

The Court: You mean I'll have to order the board members? Are they children?

Mr. Tiplady: No, Your Honor. They have always acted in good faith, but because of them becoming members of the board recently, there has been a great deal (13) of information for them to digest and determine the merits of the objections raised and determine what is the best possible retention basin site. But certainly they have been responsible and I would't want the record to indicate otherwise. I don't believe the Court would have to order them to act. I believe they would do that as members of the board.

Mr. Friedman: If I may, Your Honor.

I have sat at meetings and Allen Park would attend with citizens who ask questions and make demands, and one of the present board memebers says: "I move to table the issue until the next meeting to give an opportunity to meet Allen Park's demands.

Well, Allen Park's demands are a rehashing of what this trial was about.

The Court: It sounds to me like some of the people are losing their nerve.

Mr. Friedman: That's my concern, Your Honor, and that's why I felt —

The Court: Is the Drain Commissioner losing his nerve, Mr. Tiplady?

Mr. Tiplady: No, Your Honor, and I don't believe the board members are.

The Court: I hope not. If that's so, we will get other people to act.

Mr. Friedman: If I may, Your Honor. (14) I would like to make one other comment on a collateral subject.

Mr. Tiplady mentioned that the most attractive site other than Allen Park, as the parties seemed to agree, the most attractive site for a retention basin is this site presently owned by the City of Detroit. As of the last information I have been privy to, the City of Detroit, to use a mild word, was reticent to sell that site to the Drainage District. I don't know the reasons. I have my own suspicions why, and if possible — and if they seem to persist in their hesitance or unwillingness to sell the site, which is by all judgments the most attractive site, it seems to me it would be appropriate, since Your Honor is in a special position —

The Court: Oh, no you don't. I am even amazed that you should suggest that. I am not going to use the power of this office and that which I exert in another case to club the City of Detroit in this case. I don't want to hear any more of that.

Mr. Friedman: I wasn't going to ask Your Honor to exercise power in that sense.

The Court: What do you think you were asking me to do?

Mr. Friedman: Invite the parties to get together under your good offices.

(15) The Court: To let them know that this is what I would like them to do? What do * * * by another name?

Mr. Friedman: Your Honor, I wasn't going to suggest that you order them to do anything.

The Court: I am not going to do that.

Mr. Friedman: Thank you, Your Honor.

I think it is very important if you issue an order today setting a deadline, that it be directed to all three members of the Drainage District.

The Court: I don't know why I have to issue another order.

Mr. Friedman: In my judgment, Your Honor, if I may, I don't think any action is going to be taken unless you do issue an order.

The Court: I have two orders already. If I hear somebody moving to have sanctions applied to these people to whom the orders are directed, I will act on that. Mr. Emery says if this is done by June 5th he will be satisfied.

Mr. Emery: Correct. I'm sorry, Your Honor?

The Court: I say that if this is done by June 5th you are satisfied.

Mr. Emery: That is correct, Your Honor.

(16) The Court: So, it will be done by June 5th.

Mr. Emery: And I have Counsel's representation for the Drainage Board that the assertion that it will be done by then.

The Court: The only merit that I see in Mr. Emery's suggestion over and above the two orders is that if you want a clarification in the form of an additional order that says, "Without delay" — whether this communicates it correctly or properly or not — "that this site selection must be accomplished by or before June 5th, "I will enter such an order simply to put the parties who are to obey it then in a position to know that if they don't I will take the next step.

I think there is too much foot dragging in this case. I have a rather substantial file. I don't think this is any news to any of you, but I have correspondence from a lot of the people of Allen Park who believe that when they write letters to a Federal Judge it's like writing letters to a Congressman or a Senator or to the Governor.

It is not. It is a different office entirely.

But I did something that I have never done before, and that is, I wrote a letter to the people that up that (sic)

time had written to me. And I asked Mr. Tiplady, in order to prepare that letter, to give me a (17) chronology of what had occurred in the past. Because you will remember that in the trial of this case there was substantial proof that up to a certain point in time they (sic) public officials of Allen Park were as eager for this project as anybody else. Congressmen were interceding to get the Environmental Protection Agency to move. Everybody wanted the golden spigot turned on.

But now that it becomes necessary for the citizens of Allen Park to bear their share of the burden, their 20 percent, now they want to undo everything.

Now a United States Court cannot be subject to that kind of political pressure. And I would hope that the Drain Commissioner and everybody here understand that I mean business. If I have erred, Mr. Feiler will see to it that my error is corrected in Cincinnati, and that is as it should be, and that process is under way. But I think Mr. Feiler is completely correct in his motion papers in pointing out to me as he did, that this is not Allen Park's problem. This is the Drain Commissioner's problem, and the Drain District's problem.

Mr. Tiplady, I know Mr. Youngblood is in court here but I don't know whether the other members of the board are. But they had better get moving. Either that or I am going to get the impression that maybe Plaintiffs were not very sincere about this litigation to begin with.

(18) I will tell you this. I wouldn't have dropped everything a year ago to take this case only to be told a year later that you haven't moved it very far. I suppose nothing has really been done yet, has it, to effect this order? I will bet not one spade-full of dirt has been turned, right?

Mr. Emery: Your Honor, no dirt has been turned, but there has been a lot done in terms of the funding

through the Drain Commissioner and in terms of proceeding with that as far as they could go pending the resolution of the litigation. As I say, the process of selection of the site has been proceeding at a pace, at least that was my impression, with the preparation of another particular document evaluating nine different sites for the retention basin within the City of Allen Park, which was where the City of Lincoln Park backed out on the site there. This is the next step, and I have gone through the report and it has covered, I think, everything very well, the things that needed to be done.

But, we reached a point after the public hearing was held, we expected the grantee in this case, the Drain Commissioner, to say, "All right, here is the site I want and we are going to go with the rest of the process."

In January that stopped, and that's the concern. So, there has been much done but there has not been (19) the turning of dirt. That's correct.

The Court: Well, is there anything else?

Mr. Tiplady: If I could put one item on the record, Your Honor.

The reason this site has not been done today is the continuing objections raised by the City of Allen Park. The Drainage Board is faced with an order that says: "Pick the site forthwith." A defendant comes to each board meeting, says, "Don't pick the site. We don't want you to pick the site. These are the reasons."

In our opinion those reasons were litigated at the trial and that was the opinion that we represented at these Drainage Board meetings. Today's court hearing, there has been no clarification if you will, of the original order or judgment and no request for clarification by the City of Allen Park.

We have taken a position that an Environmental Impact Study was an issue in the lawsuit as to the facility

plans, the negative declaration. There is no necessity for an Environmental Impact Study. The City of Allen Park in their objections say, "Don't put a basin until you get an Environmental Impact Study."

With respect to the merits, the City of Allen Park said, "Don't pick a basin site because the (20) securities plan is not the best way to do it. There are other ways and we need time to study it.' This is a scenario that has been in front of the Drainage Board and the Board will make a judgment before June 5th.

The Court: Well, I suppose there are due process requirements involved in all this. If they have been met, I don't know why the board does not do what it is required to do.

Yes, Mr. Moon.

Mr. Moon: I apologize for being a little late.

My name is Charles R. Moon, I appear as Amicus Curiae in this matter.

The Court: Yes, I remember.

Mr. Moon: Since the Court entered the order, I have been supervising the activity of the Drainage District and the Drainage Board for the Ecorse Creek Pollution Abatement Drain in carrying out the order of the Court.

This situation in Michigan again is somewhat anomalous in the sense that the Department of Natural Resources and the Water Resources Commission, in seeking to abate the pollution, and the United States Environmental Protection Agency also have proceeded here not only against the City of Allen Park which is a city with full powers of a public corporation, including the power to tax, but they (21) have also proceeded against two Drainage Districts, if you will, which are limited public corporations which really have power only to act on petition. And this has been, I think, explained before but I think it is important to note that the

Drainage District and the Drain Commissioner have no independent power, no right to tax or raise monies except by following the procedures that are outlined in the Drain Code which result in the levying of assessments and the borrowing of money in anticipation of paying off those assessments.

And these procedures have been under way in this particular case for about four years.

The portions of the proceedings that pertain to the so-called "second segment," which is the part now under consideration, were revitalized and reinstituted following the order of this Court. And the Drainage Board and District have proceeded in accordance with the statute with as much expedition, I believe, as they could do considering the fact that they were met at every step by objections and desire to have more time to consider and desire to make objections by an appeal, not only from the order of the Court which was not stayed, but also by an appeal now pending before this Court on removal and subject to a motion to remand from the final order of apportionment.

That step had to be taken by this Drainage Board and Drainage District before it could proceed (22) to making assessments and borrowing money. That step had to be taken as provided in the Drainage Code, and it is subject to an appeal by certiorari or order now of superintending control. This is pending.

Until that appeal is disposed of, the Drainage Board and Drainage District has no power to borrow money and no power to make the ultimate assessments. They have apportioned on a percentage basis which indicates which of the public corporations will bear what percentage of the cost of the drain, but they have not made the actual assessments in dollars which ordinarily would be made and spread over a period of years. In anticipation of payment of those assesments, then bonds would be issued.

The Court: What is the status of the proceeding?

Mr. Moon: It is now pending before Your Honor on a motion for removal and a motion to remand, and a motion for summary judgment is up next week.

The Court: Any reason why we can't take that up today? When was it noticed?

Mr. Moon: The 23rd.

The Court: Have all of the parties responded?

Mr. Feiler: Your Honor, the motion to remand is ours; the motion for summary judgment is the (23) Drainage Commissioner's. I can't tell what the motion is for.

There has been no brief filed with it. But we have been unable to respond to the motion for summary judgment thus far.

The Court: Is it your motion, Mr. Tiplady?

Mr. Tiplady: Yes. The motion for summary judgment was intentionally motioned up for next Tuesday, the 26th. That's the same time I sent my notices out, I received a motion to remand for that same day. At this time I am going to have to reschedule the motion for summary judgment because I do not have enough time to brief both the motion for a summary judgment as well as the motion for —

The Court: Why not? You have got five days between now and then.

Mr. Tiplady: I will have it ready by next Tuesday, Your Honor.

The Court: Unless you are not serious about this —

Mr. Tiplady: I will have the brief in court by Tuesday morning.

The Court: Is it scheduled for next Tuesday?

The Clerk: Yes, it is, Judge.

Mr. Moon: If the remand is denied, then the Court has before it —

(24) The Court: I am not familiar with the motion to remand. Remand where?

Mr. Moon: To the Wayne County Circuit Court from which it was removed.

If that is denied, the Court will have before it a motion for certiorari, now called superintending control. The petition has been filed and it is now an issue, and the burden is on Mr. Feiler and Mr. Glass because they are the ones who seek certiorari, and it is a review of the motion record by this Court; a motion for summary judgment as a way to bring it to this Court's attention for hearing, but it is certiorari.

Mr. Feiler: With all due respect to Mr. Moon, that seems to be another issue in another case, and if we are going to argue it, I would like to argue it.

Mr. Moon: I meant merely it is pertinent here only — At this point the Drainage Board can do nothing further as far as financing is concerned until the certiorari is disposed of.

The Court: Was there some reason why these proceedings took so long to get here?

Mr. Moon: No. I think that — just that people are entitled to time. They have 20 days in which to file the writ, then it went to Circuit Court. The certiorari was issued by the Circuit Court — I am using (25) old-time language. This is the way it is done now, but it is the effect — Then the motion to remand was made and the removal occurred and then there is a motion to remand.

The Court: I take it that's your motion, the motion to remand?

Mr. Feiler: Yes it is, Your Honor.

Mr. Moon: And then there is a motion to bring the matter at issue on certiorari if the remand is denied.

The Court: I will hear that matter on Tuesday at 2:00 o'clock.

Mr. Moon: To continue with what the Commission can do and what it cannot do under the law, the Drainage Code also provides that when there is an order by the Water Resources Commission, the Department of Natural Resources, that that order has the effect of a petition, and that it also has the effect of making a determination of the necessity for the drain so that the proceedings are to go on from the point of — to the point of final order of apportionment, which is where they are now.

The Drain Code further says that if there is pollution of a drain by having sanitary waste in it, and if it is determined by order that persons or public corporations are the source of that pollution, then the Water Resources Commission and the Drain Commissioner, Drainage (26) District, can require those public corporations to correct the pollution.

So that the real burden here in the end and the real problem is that in settling this burden, you might say, on the City of Allen Park and the other communities involved in this procedure, and all the Drainage District can do under your own order is carry out the proceedings which place the burden on the local community.

The question of site is one in which even after the final order of apportionment is approved, the site still has to be obtained. The two sites which seem to be most desirable are owned by other public corporations. So that through the ordinary processes of condemnation is not the way out. It has to be done by negotiations. And that is where it stands.

I think, in defense of the Drainage District and the Drain Commissioner, they are doing all they are empowered to do as a limited corporation. And they

don't have the powers that the City of Allen Park has. I think it should be made clear that in this case all the Drain Commissioner can do is act as a conduit to impose a burden or benefit on the City of Allen Park. That is the posture here. But it does seem like a slow procedure, but in some ways the drains are always slow because you have the steps and the right to be heard and so on. And it is very hard (25) for anybody to stand up in front of three or 4,000 people who are saying the project is wrong, it should not be constructed. It is very hard to get ahead on the basis that you know it is going to be constructed. And that really is the problem here.

We have a great many statements made to us by public officials who insinuate that the Court is wrong; that the matter has not been properly investigated. They charge persons involved in this like myself and the engineer with personal fraud and so on, personal interest. It has been very difficult, and I hope the Court understands that the Drain Board and the Drain District is doing very well. They have got a lot of lumps and scars. And you know the advice that President Truman used to give — they are in the kitchen.

Mr. Emery: Your Honor, I would want to respond to this because I don't want any misconception on this.

I think it is clear that the Drainage Board and the Drain Commissioner, as the grantee for this project, who must make the site selection in order to kick in the rest of the process, and that they are empowered to do.

Granted, Mr. Moon's comment with respect to the various funding requirements. I am talking about on simple step — Well, I shouldn't say "simple" — one precise (26) step at this point. They had to make a site selection so we can fit in the rest of the process and get going. I don't think there is any concern —

The Court: You may have such an order. I have outlined this before. Mr. Friedman.

Mr. Friedman: Your Honor, I would like the record to show that one of the Drain Board members, aside from Mr. Youngblood is present in court, Mr. Ted Murkawski. I would like the record to reflect his presence.

Before Your Honor leaves the bench, may I have one second?

(Discussion off the record)

Mr. Tiplady: Your Honor, there is one matter of great concern of the Drainage Board and the Commissioner, and that is, in some correspondence from DNR it was indicated that there was a necessity after the retention basin site was selected for the Drainage District to conduct another public hearing with respect to the drainage site and location. It is the position of the Drainage District that they complied with all the public requirements at the last hearing, and in our opinion there is no statutory or other requirement that the Drainage Board request another public hearing with respect to the site.

The Court: What is your request?

(27) Should there be a public hearing?

Mr. Tiplady: I am asking the DNR because they intimated that there is a requirement for a public hearing and we don't think there is any statutory authority for that and ask Mr. Emery to provide that if there is.

Mr. Emery: I am not particularly familiar with the correspondence that was involved. Under normal grant procedures, as I understand, as set forth in CFR 35.917 there is a public hearings with respect to the particular sites involved.

Now, I understand that there was a public hearing on this document on January 28, 1981. And the normal procedure however, is that after the site is chosen there is a public hearing such as occurred with respect to the elements to Plan Alternative One. I don't think the regulations —

The Court: What is the purpose of that second hearing? What do you do?

Mr. Emery: I think normally —

The Court: Do you undo what you have done in the first decision?

Mr. Emery: No. That was to have the report be out and the alternative chosen, I guess.

The Court: Look, this is a plain and (28) simple question. If you are able to answer it — if you have to look into it, that's another matter, but if you are able to answer it: Is there to be another hearing after the site is selected by or before June 5?

Mr. Emery: Inasmuch as there has been one public hearing already, the regs call for a public hearing, as I read them. There has been one public a hearing. Now, whether or not it is pertinent, that it is with respect to all these alternatives or before the Drain Commissioner selected one, I am not sure. There has been one public hearing on the document. There has been as pointed out here, and I have seen the minutes, there have been numerous public hearings before the Drainage Board with respect to the same issue.

The Court: Well, you see, it doesn't do you much good to ask me to order the Drain Commissioner to do this by or before June 5 — that's what you said in the earlier part of the hearing. Now you raise the specter that even if that's what he does before June 5, then everybody is going to get involved in another hearing. You had better get your act together, Mr. Emery.

What is it?

Mr. Feiler: It may be that one hearing, that could cover it. Certainly, it has been ventilated in the public.

The Court: But Mr. Tiplady is saying (29) that your client is telling them that there is the specter of another hearing. Is that so? Has your client said that?

Mr. Feiler: I believe they have.

Mr. Friedman: May I make a suggestion?

The Court: No. Just a minute, Mr. Friedman.

Mr. Emery: It has been represented that there was correspondence from the DNR. I have been shown a document and I am sure where it says —

The Court: Take your time and read it.

Mr. Feiler: Your Honor, perhaps I can offer a helpful comment on the public participation.

The Court: You don't mean to say that you are getting on the other side now?

Mr. Feiler: No, Your Honor.

The Court: It might be misunderstood.

Mr. Feiler: 35.917 is the Facility Planning process and I forget which section in there, but within there it refers back to 40 CFR part 25, which has some rather specific requirements for public participation, the kind of hearing, the informaton exchanged and a portion in the facility planning part of the proceeding is a rather cursory statement of a rather elaborate public participation scheme set forth in 25.

Mr. Emery: Your Honor, I have just (30) consulted with some DNR staff. It is my understanding that the time limits in question came up with Counsel for the Drain Commission — not Mr. Tiplady but Mr. Supwith (sp) indicated that perhaps there was some question and that — as to whether that meeting in January was in compliance with the regulations. And I am told that the DNR suggested that if there was any doubt in their minds, they should have another one if there was any doubt in their minds that the meeting held January 28th complied with the regulation as to notice, opportunity for hearing and so on. And that is my understanding of the origin of this somewhat offhanded comment that —

in a letter that there may be the scheduling of another public hearing.

I think the key point is that the due process requirements are met. And as I read the regulations there is only one public hearing required, and as long as I suppose the Drain Commissioner can substantiate that the notice and other requirements were met by the January meeting, then that may well be a meeting that can comply with the regulation.

The Court: Well, I have the section here, and in Title 4035.9117-5, public participation is subpart seven.

Hold a public meeting to consult with the public in accordance with 40 CFR 25.6 when alternatives (30) are largely developed but before an alternative or plan has been selected. And then prepare and circulate a responsive summary in accordance with 40 CFR 25.8. Then, from subsection 8 it says: "Hold a public hearing prior to the final adoption of a facilities plan in accordance with 40 CFR 25.5. This public hearing may be held in conjuction with the public hearing on the draft Environmental Impact Statement under 40 CFR 6 — That latter sentence obviously is not applicable in this instance.

Now, if you were to draft an order today based on the motions that you filed, that the Drain Commissioner shall act by or before June 5, which one of those actions are you talking about? I thought you were talking about selecting a site, right?

Mr. Emery: Well, Your Honor, that's right.

The Court: And isn't that site selected in accordance with the final Facilities Plan?

Mr. Emery: Yes.

The Court: Doesn't it fall then, under Sub-7?

In other words, have a public hearing petition to — In other words, has a public hearing prior to the adoption of the Facilities Plan been held?

Mr. Emery: The January 28th meeting has (31) been held with respect to this document.

The Court: Then I think what you have got to do is to inform yourelf so that you can inform me whether or not that public hearing prior to the final adoption of the Facility Plans which is provided for has, in fact, been held. If it has in fact been held, then I don't think another hearing is necessary.

On the other hand, if the hearing that has been held is the hearing referred to in Subsection 7 then presumably another public hearing may be necessary.

Which is it?

Mr. Emery: I think the question that I would have, Your Honor, is whether the notice requirements and the opportunity for hearing requirements at that January meeting comported with the regulation. It certainly did cover what I understand to be at least the final Facility Plan, which is the document that I referred to in my motion.

The Court: Why don't we do it this way. We are all going to be getting together Tuesday at 2:00 o'clock. At that time be prepared to present an order and to set forth MDNR's motion as Mr. Tiplady has requested you set forth your position with regard to the regulations.

Is there anything else? Yes, Mr. Feiler?

Mr. Feiler: With regard then to the (33) order to quash, it will be granted today, the subpoena?

The Court: Well, I don't see any need for the taking of any testimony with regard to this. Does anyone see that differently?

Mr. Emery: No, Your Honor.

The Court: Therefore, any of the subpoenas will not be used, and I guess that's mooted out.

Mr. Feiler: Thank you, Your Honor.

Your Honor, I have one other request and it does refer to Mr. Moon, and I can tell the Court quite frankly I approach it somewhat sensitively because I have the greatest respect for Mr. Moon's credentials and ability. But Mr. Moon keeps portraying himself as an amicus in this case, and gave an address as a Master in Chancery.

Mr. Moon is a very fine attorney and I think he should be acknowledged as one of the attorneys for the Drain Commissioner and present his arguments as arguments of Counsel. I think that's what the facts would establish, that he is indeed, attorney for the Drain Commissioner and has represented him throughout the proceedings. And I just don't want any greater stature for one counsel in this case than the other. We are all attorneys of record and the arguments that we present as either officers of the court or whatever else we may be, we are all attorneys presenting arguments —

(34) The Court: Well, that may be. Mr. Moon was admitted, though, as an amicus for the purpose of this case.

Mr. Feiler: Again, it is not something I want to make any issue of, but to clear it up. Mr. Moon was being paid for representation on behalf of the Drain Commissioner, which certainly we are all being paid for representation. But I think to portray oneself as an amicus when one is in effect, representing a party, it could be potentially confusing to someone looking at this record. And it seems to me that where a person is making arguments on behalf of a client he should be acknowledged as an attorney of record, and I certainly have no problem with Mr. Moon's acknowledgment as an attorney of record.

The Court: I don't have any difficulty with it. Mr. Moon is a respected member of the bar of this Court. He testified at length at the trial. He does have a position

here as an amicus. It is very well known that he was very well informed in this whole area, perhaps more so than any other individual, and I am not sure just what the thrust of your point is.

In one of your papers I read that another individual — Who was it, Mr. Trimm?

Mr. Feiler: Mr. Trimm.

The Court: What was his name?

(35) Mr. Feiler: Mr. Don Trimm.

The Court: Yes, there was criticism, I think, by your client of his position.

Mr. Feiler: Not of his position —

The Court: But wasn't it a fact that at one time he worked on behalf of the City of Allen Park?

Mr. Feiler: No, Your Honor. He was always strictly working for the Drain Commissioner.

The only thing we were attempting to show is that the Court should not be led into a broader position when it became obvious at the trial that the Drain Commissioner was paying for consultation with the Plaintiffs with the very people who were suing him.

The Court: You know what the real problem in this case is? The real problem is not that nor is it the real problem that I will be led astray by anything that Mr. Moon would say. And I don't think Mr. Moon would ever want to lead me astray. I don't think he is that kind of a person.

But to get really down to the problem here, the mischief in this is that the public officials, the leaders of Allen Park, the people who helped make this decision some years ago, where are they now? Where are they now, the people that implored the grant of Federal funds for this project?

(36) Allen Park, as you know, was an enthusiastic supporter of this project. Where are these leaders of yesterday? Now, I can understand why people are confused. They have no leaders. Well, it is easy now to say: "We don't care about a little pollution in our back yard if we don't have to pay some more taxes." But the real mischief here, the real difficulty here is that these people who decided these things after public hearings in Allen Park — the record has been made — their voices are not raised. Do they still live in Allen Park?

Mr. Feiler: I can't answer that for you, Your Honor.

The Court: Do you know where they are?

Mr. Feiler: No, Your Honor.

The Court: Mr. Moon.

Mr. Moon: I do think I should inform the Court that my attitude in this matter has changed since the earlier trial of this matter and the issuance by Your Honor of the final order and judgment, that I was then retained again by the Drainage District for the purpose of carrying out the proceedings necessary to finance the second segment of the original Facility Plan Element 1 or Element 2 — I forget the numbers now — so that I have been engaged in carrying on meetings with the Drain Board and hearings with the Drain Board, and I attended the hearing on the retention (37) basin which is not a hearing required by the Drain Code but it is a hearing which is a step in obtaining the grant funds and the totality of the financing —

The Court: Mr. Moon, you don't have to defend yourself in this Court. The record is clear, I think, and I have no difficulty with it.

Mr. Moon: Thank you.

The Court: If I misspoke in saying that you don't have to defend yourself in this court, I retract that. What I meant by that is that I don't have any problem with it and I am sure you don't.

Mr. Moon: My job in carrying out financing of this facility, if it is to be financed, requires a combination of carrying out the local shares, a substantial portion of which is the responsibility of the City of Allen Park, and returning and getting in hand the grant contract for the grant procedure. The retention basin is one part of the grant that is unsettled. Therefore it is — to me as counsel it is necessary to know the grants will come in the full amounts and the local shares will come in the full amounts.

The Court: I am satisfied, looking back at the role that you did have, and I am satisfied that no matter what the situation was, if you didn't think I could properly act you would have advised me, notwithstanding whatever the result of that would have been.

(38) Mr. Moon: That's correct.

The Court: I am satisfied.

We will meet next Tuesday at 2:00 o'clock.

Mr. Feiler: Thank you, Your Honor.

Mr. Friedman: Thank you, Your Honor.

(Cerification Omitted)

TRANSCRIPT OF PROCEEDINGS OF JUNE 30, 1981

(United States District Court —
Eastern District of Michigan —
Southern Division)

(City of Allen Park, a Municipal corporation, Plaintiff, v Ecorse Pollution Abatement Drain No. 2 Drainage District, a body corporate, and Charles N. Youngblood, Wayne County Drain Commissioner, Defendants. Civil Action #81-70353)

Proceedings had in the above-entitled cause before the HONORABLE JOHN FEIKENS, Chief United States District Judge at Detroit, Michigan, on Tuesday, June 30, 1981, commencing at or about the hour of 3:00 p.m.

Appearances: Feiler and Glass, P.C., By Michael H. Feiler, Esq., 32969 Hamilton Court, Suite G 100, Farmington Hills, Michigan 48018, appearing on behalf of the City of Allen Park; Pagnucco & Kruse, By Kenneth D. Kruse, Esq., 7000 Roosevelt Avenue, Suite 100, Allen Park, Michigan 48101, appearing on behalf of the City of Allen Park; Sepmliner, Thomas & Tiplady, By Robert P. Tiplady, Esq., 711 W. Ann Arbor Trail, Plymouth, Michigan 48170, appearing on behalf of the Defendants; Dickinson, Wright, McKean, Cudlip & Moon, By Charles R. Moon, Esq., 800 First National Building, Detroit, Michigan 48226, appearing on behalf of the Defendants; Karl R. Overman, Esq., Assistant United States Attorney, 817 Federal Building, Detroit, Michigan 48226, appearing on behalf of the U.S. Environmental Protection Agency; Thomas J. Emery, Esq., Deputy Attorney General, 714 Law Building, Lansing, Michigan 48913, appearing on behalf of the State of Michigan, the Department of Natural Resources.

(3) Detroit, Michigan
Tuesday, June 30, 1981
About 3:00 p.m.

The Clerk: Allen Park v Ecorse Pollution Abatement Drain No. 2 Drainage District and Charles N. Youngblood, Civil Action #81-70353, a Motion to Recuse.

Mr. Feiler: Good afternoon, Your Honor. Michael Feiler, appearing on behalf of the City of Allen Park in this cause.

I confess to the Court, I have had easier motions to bring on than this has been to bring. However, your Honor, I believe that —

The Court: May I interrupt you for a moment. This has nothing whatever to do with this case, but I see Mr. Emery is here.

And in the other main case, Mr. Emery, I wonder if you could just stay on for a few minutes after this proceeding because I don't know whether or not you have been brought up to date by Mr. Hinshon as to the orders that have been circulating for approval.

Mr. Emery: You mean on the Detroit matter, your Honor? I will stay.

The Court: All right.

Mr. Feiler: Your Honor, I have not much to add to the motion in the way of argument, in addition to (4) what is set forth in the motion papers and brief.

The motion, as I hope your Honor will understand, is not any attempt or intent —

The Court: Mr. Feiler, don't worry about it. I will tell you, I'm getting so sick and tired of sewer systems that I wish I could not only dismiss all of the cases, I wish I could find on a personal basis some reason for extracting myself from the handling of these problems.

Unfortunately, everyone in the last couple of years has become a companion case to the main case which seems to just be a career. So, don't worry about trying to get me out of this case. I am looking under rocks for reasons to do that myself, and you might give me some approach that I haven't thought of before.

Mr. Feiler: Perhaps I can be of some help, then.

The motion is brought under rule 455 sub (a), 28 USC 455 sub (a). We have cited the recent 6th Circuit case of *Roberts* v *Bailor*, which is 625 f 2d 125.

The Court: You don't think that case is applicable, do you?

Mr. Feiler: I do, your Honor.

The Court: If before I had tried the liability case against Allen Park, the one that resulted in my opinion from which you are taking appeal, and I had made (5) a comment on the credibility of a witness who was to appear before me, that would be the *Roberts* case. As I understand that case, Judge Robert Taylor, who, by the way, is one of the finest judges in the 6th Circuit, made a slip. Before he went to trial of that case — and knowing Judge Taylor as I do, I don't think it made a bit of difference to him, but it was the appearance of it — he dismissed the case — correction — he substituted the case which had been against — was it a man by the name of Graves —

Mr. Feiler: Graves, yes.

The Court: And put the postmaster in as a nominal defendant — and then went on to say, "As far as Mr. Graves is concerned, I don't believe he could ever intentionally discriminate against anybody."

Well, the trouble was that Graves was going to be the principal witness in the case for the defendants, as I understand it.

Mr. Feiler: I don't believe the 6th Circuit makes that finding, your Honor.

The Court: That's a very important distinction to me, because everything that you are dealing with here is after the fact.

Mr. Feiler: Your Honor, may I interrupt on that point?

The Court: I am not talking about the (6) credibility of the witnesses before I tried the case. I am talking about these things after my opinion.

Mr. Feiler: But we have a new case now, and that is the apportionment case which was initiated in state court as a separate action, removed to your Honor not on a consolidated basis.

The Court: What issue in the new case are you raising? Are you raising all three grounds in the new case?

Mr. Feiler: They only apply to the new case at this time.

The Court: So, the answer is yes?

Mr. Feiler: Yes, your Honor.

The Court: Where in any one of these three grounds that you raised in the new case have I in any way said anything about the credibility of a witness?

Mr. Feiler: Your Honor, in the portion of the transcript that we have cited, and this is the third point in our motion, and that is the comment of the Court with regard to Mr. Moon who appeared before this Court as an amicus and then almost as an attorney for one of the matters.

The Court: Let's find out about that. In my opinion, that's why we can't separate out — let's see — yes, in my opinion at page 25, this is what I said, under (7) the heading "Financing will be local share"

"In its answer in this lawsuit, Allen Park raised as a defense its inability to finance its local share because of the law and constitution of the State of Michigan, specifically the recently-ratified Headlee Amendment to Article IX of the Michigan Constitution, and the legislation implementing the Headlee Amendment. However, Allen Park submitted no brief on the subject nor did it offer any testimony to rebut that presented by Plaintiffs' witness, Charles Moon, a prominent bond attorney and amicus curiae in this suit."

That is correct, is it not? You offered no brief nor did you oppose that testimony at the time?

Mr. Feiler: Well, your Honor, I wouldn't want the record to indicate that we had no comment about it.

The Court: Did you submit a brief?

Mr. Feiler: We did not.

The Court: Did you offer any testimony to rebut that presented by Mr. Moon?

Mr. Feiler: Well, we offered the suggestion that that was really not an adjudicated issue.

The Court: Did you offer any testimony?

Mr. Feiler: On that issue, no, your Honor.

The Court: That's what I said in my opinion.

(8) Now, in the brief that was filed by Mr. Moon at the time, to which no objection was made by you, this brief was filed March 17, 1980. The brief begins by saying:

"In this matter, the Chief Judge presiding has asked counsel for various of the parties to obtain through the office of the Wayne County Drain Commissioner a discussion of the principles of state law and of the requirements of the municipal bond market which bear upon the legal power and the practical aspects involved in possible orders issued and remedies

invoked by the federal district court. The purpose of this Brief Amicus Curiae is not to take a partisan position in the litigation on the merits nor to participate in any dispute of facts or law as pleaded or proved. Therefore, factual statements in this Brief Amicus Curiae are assumptions and premises for the purposes of discussions, except for those facts which are items of public record in the office of the Wayne County Drain Commissioner or of the City Clerk of the City of Allen Park or in the records of this federal district court."

Now, you received a copy of that brief, did you not?

Mr. Feiler: Yes, your Honor.

(9) The Court: You didn't take any exception then to that particular russitation that I have just given you. Did you take any exception to the statements that were made in that brief at the time?

Mr. Feiler: I would suggest, your Honor, that in order to answer that, we would have to state our whole position.

The Court: No, I don't mean on the merits. I don't mean that. Did you take exception to the fact that this brief was being offered for the purpose that Mr. Moon suggested it was?

Mr. Feiler: No, your Honor. We believed Mr. Moon was appearing and was a neutral amicus.

The Court: Then that's what I understood, too.

Then when you came into this Court in connection with a new case, you began being critical of the position that Mr. Moon had taken before me in the earlier case, did you not?

Mr. Feiler: We did, your Honor.

The Court: And it was with response to that that I replied after you had raised that issue. You raised it before me.

Mr. Feiler: Yes, your Honor.

The Court: It called for a response on (10) my part, did it not?

Mr. Feiler: It seemed to me it called for a response on Mr. Moon's part.

The Court: Not on my part? Didn't I have to react to the fact that you were saying that Mr. Moon was acting in a position that I should take note of?

You see, the difficulty that you are presenting to me is this. At the time that Mr. Moon testified in the earlier case, the real thrust of that case, the thing that all of us were interested in was: Is there a pollution problem here; is this Ecorse drain presenting something that ought to be corrected? It was for that reason, as you remember, I went down to the site, and we traipsed all around there, and I heard experts on this, and there was a good deal of testimony. And at the end I found that the Environmental Protection Act was being violated.

It was when we got to the remedy: What do we do about this, that I had to meet your defense that is raised, as I just commented on in my opinion. That is to say, your defense of your inability to finance your local share.

Now, this I had to face because, having found liability, I then had to fashion a remedy, had to do something about the finding.

It was in connection with that that I invited the comment that lead to the introduction of this Brief (11) Amicus Curiae. You didn't object to that; you didn't offer any brief in rebuttal; you didn't offer any brief in opposition; you didn't offer any testimony in opposition to the testimony of Mr. Moon.

Then, in the new case, the apportionment case that I am now involved in, you come into Court and you say, "Judge, we want to call your attention to the fact that Mr. Moon has got some kind of standing in this case that the rest of us lawyers do not have." And it was with regard to that that I responded.

Having responded to that, you say, "Aha. That shows you are not impartial." Well, you called upon me to react to your accusation against him, did you not?

Mr. Feiler: I don't believe I did, your Honor.

The Court: Why did you raise it?

Mr. Feiler: The point of it being raised at that time, and the transcript of the hearing will reflect that, I approached the matter with great deference to the Court and to Mr. Moon. It was simply to point out to the Court that we had learned subsequent to the trial that while we had no objection to Mr. Moon appearing as an amicus, it did turn out that he was paid by the Drain Commissioner for consulting with persons on the opposite side.

Your Honor, if I may just finish — and we (12) believe that that was germaine to the future role at that time of Mr. Moon, that he should be looked upon simply as an attorney representing a client.

The Court: He is in a different category now. He has been ever since he appeared in the new case. But here he is appearing as a lawyer and as an advocate. But he was not in that context viewed either by you or anybody else or by me as an advocate, was he? You didn't say to me at that time, "Hey, wait a minute. Don't listen to this man, Moon. He is working for the Drain Commissioner."

Mr. Feiler: I had no idea at that time. That did not come out until we examined the Drain Commission records and found the bill submitted by Mr. Moon.

The Court: Are you saying I am not impartial? What are you saying? That that didn't come out until now and there ought to be a new trial? Is that what you are saying?

Mr. Feiler: Well, my motion does not go to that.

The Court: How do you say that I am not impartial because the time that I heard Mr. Moon, I was operating on the premise that you were operating on, and that was disclosed in his brief which I read to you, that his brief was being filed not to take a partisan position in the litigation on the merits nor to participate in any dispute of fact or law, (13) but on the basis of the items in the public record for the purpose of a discussion of whether or not the Headlee Amendment impacted with regard to the Drain Code.

Now, later you say, "Well, we found that out, and because we found that out we want to call it to your attention — and respond to that." And when I respond to it, you say that, "You are not impartial." I don't understand it.

Mr. Feiler: I don't think the connection obviously follows, your Honor. Our efforts to point that out, and I think I indicated several times it was not to cast any aspersions or impune the integrity of anyone in this courtroom. Our apprehension at that point was that we had learned after the trial — in the beginning of the trial we asked that the Drain Commissioner be made actually a Plaintiff because they were in favor of the project. The Court saw fit to keep them as a defendant so they should be ordered to carry it on should it be necessary. All we endeavored to show the Court was that there was a potential of inviting the Court to go further because there was not a real Plaintiff or a real Defendant in terms of the Drain Commissioner, and the fact that the Drain Commissioner paid the opposition is indicative of that.

But your Honor, that is not the issue before the Court on this motion. That came up at May 20 hearing, and efforts at least to advise the Court, as I (14) thought it was my duty to advise the Court, that when the Defendant is paying for experts for people suing you, the Court ought to at least be aware of that and treat matters, perhaps with some amount of circumspection. But some of the comments that came out — and I would preface this by saying, your Honor, that I don't have to point out to the Court the great amount of public view that this case has received and continues to receive. But we are dealing now with a new case which the Court has taken so far under its ancillary jurisdiction and there are motions pending with regard to the second independent case to which our motion is addressed. And that is, your Honor, in the matter of Mr. Moon and his participation in this case — and I know Mr. Moon is here, and again I will state clearly for the record that I believe Mr. Moon to be a gentlemen of absolute integrity.

The Court: But if I say that about him, you think that means I have got to refuse myself? You can say it. It's okay if you say it, but if I agree with you I should refuse myself?

Mr. Feiler: No, your Honor, I would not say that I would believe everything that Mr. Moon said.

The Court: He is in this case as a lawyer.

Mr. Feiler: That was not made clear. Your Honor would not address that, and that was part of the problem.

(15) The Court: You did not know that I knew he was a lawyer in this case, in the new case?

Mr. Feiler: I attempted, your Honor, to point out at the May 20 hearing that Mr. Moon should now be recognized as an advocate in this case and that his

position now was really one of an advocate representing a client.

The Court: I think that is true.

Mr. Feiler: And I think Mr. Moon made some effort towards that end, and I don't want to speak for Mr. Moon, but the record will reflect that, what the Court stated on the record is clear. Again, I can't change your words.

The Court: Well, I stated no more on this record than I would state about any lawyer that I would regard as being a lawyer of good repute, of high standing. And I hope that every lawyer that appears here — and I feel this way about you — displays that kind of standing.

Mr. Feiler: Thank you, your Honor.

The Court: But that doesn't mean that if I have that kind of impression as to a lawyer and I state it, that that necessarily means that that lawyer has got an in over another lawyer. Roles change. Mr. Moon was in the old case as an expert. He is in this case as an advocate, but that doesn't mean that I regard him any less.

Mr. Feiler: Your Honor's comment at page (16) 37 of that transcript is one that is particularly troublesome, and I will try to make the connection specifically with regard to this motion.

The Court: Page 37?

Mr. Feiler: Yes, and that is after two or three pages of dialogue on this issue.

The Court: What date are you speaking of, Mr. Feiler?

Mr. Feiler: That would be May 20th.

The Court: May 20. All right. Go ahead.

Mr. Feiler: Where at the bottom the Court indicates its belief or apparent belief that Mr. Moon would advise the Court if the Court was not acting properly regardless of the outcome.

Now, the reason that becomes germaine specifically to this present case, your Honor, is that we are dealing with a challenge to an apportionment. The apportionment was made by the Drainage Board, and the Court has many pages of transcript before it on those motions. Suffice it to say that the transcripts clearly reflect that Mr. Moon was a direct participant and advisor to the Board in those proceedings. And certainly, a person looking at the Court's comment with regard to Mr. Moon would not lead the Court astray, is that a logical connection or certainly, (17) a reasonable question to raise —

The Court: You see, the merits of the dispute — I am reviewing this record as an appellate court, right? I don't substitute my judgment for the commissioners, the Drainage Board. I am reviewing it as if on certiorari. So, I am not finding credibility when I look at the record before the Board. I am concerned with whether or not there was due process, whether there was notice, whether there was an opportunity to be heard, the various items that are required to be looked at by the Drain Board have procedurally been looked at.

But I do not review credibility. I don't say, "Under those circumstances, I would not have believed this witness or would not have believed that witness." So, that credibilty is not before me; isn't that so?

Mr. Feiler: I would say, yes, your Honor.

The Court: That being so, I am not looking at the proceedings before the Drain Board in the light of a trial judge making a decision on credibility or on the merits. What I am determining is whether or not the record before the Board comported with due process. That's what I am looking at.

Mr. Feiler: Your Honor, I hope, and I am sure that the Court has no confession with the thrust of my motion —

(18) The Court: Well, here is the difficulty that I have with it. Let me read something to you — and you have got to accept it from me on faith, that it makes no difference to me whether or not I stay in one case or another. There are so many cases around here, and we are beset with problems, that whether I or fourteen other judges hear a case really doesn't matter — and you have to accept that from on faith. So, I am not bounded by your motion in that sense.

Here is what bothers me, and I wish I could improve on this legislative history, that is, the legislative history that lead to the enactment of this disqualification statute. While the proposed legislation would remove the duty to sit on concepts of present law — that was the old test — you had the duty to sit. A cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. And with fourteen other judges around here, that duty to sit, I can tell you, is not viewed by me as being a very important duty, that is, the duty to stay in a case.

However, the new test should not be used by judges to avoid sitting on difficult or controversial cases. That's a preface to what I want to read to you. Listen to this. I can't improve on this.

"At the same time, in assessing the reasonableness of the challenge to his impartiality, each judge (19) must be alerted to avoid the possibility that those who would question his impartiality are, in fact, seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a reasonable

inference that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice."

I can't improve on that. I have taken a position against your clients. I did that after fairly, and I thought impartially, considering all of the evidence. You have that case on appeal. It may well be that the Court of Appeals may disagree with me. If they do, so be it. That's the function; that's the processes.

You are going to have a fair hearing, I am sure, on appeal. But to say to me now that because, after you have raised a question as to me — as to Mr. Moon in this case and I respond to it, that I, therefore, should now recuse myself, it seems to me is not prompted so much by what seems to be your argument on the surface as it is prompted by (20) your clients' desire to get rid of me at all costs because I made a decision adverse to them — and I may make another one adverse to them. That's the fear that I think prompts the motion for disqualification, not because you think Mr. Moon is not entitled to be believed by this Court when he testified as an expert, if I find him credible — not because I am going to pay as much attention to him as I do to your arguments as an advocate, but because the possibility is there that your clients have said: "Isn't there some way that you can get that fellow, Feikens, out of the case?"

Mr. Feiler: I would like to assure the Court that that is not the moving consideration in this motion.

The Court: I don't know. I have never had more correspondence directed to me in an organized fashion than in this case. I don't think all of these people from Allen Park are writing to me because it occurred to them as a good idea.

Mr. Feiler: I hope the Court is not suggesting —

The Court: I am not suggesting that you are orchestrating it. I am suggesting that it is being orchestrated; I am suggesting that it is being done. I don't know that that's proper.

But that raises another point that you bring up.

(21) It's a catch-22 situation. Because I am conscious of the fact many of these people there in Allen Park are deeply concerned with my decision, and many of them wrote in the same vein; "How can you arrive at a decision such as this? Don't you understand what this will do?" Most of them said, "We never had a hearing on this. What are you trying to do without our being involved in this?"

Well, you know as well as I that the record that was prepared in the old case, the former case, talked at length about the proceedings that were held a number of years on the way to the approval of this entire — what did they call that — segment 2 — I was being asked in many of these letters: "How can you do this when there was no hearing?"

Now, from the voluminous testimony that was offered, I remember that there was a chronology of events that had taken place. There was a sequence of hearings that had been testified to by witnesses in this case. To get me that chronology.

Now, I could have spent hours going back into the record in this case and developing the chronology from it. But, unhappily, we don't have that kind of time any more. I said, "Mr. Tiplady, get me a chronology of the hearings in this case because I want to point out to the people who are writing, saying they had no hearing in this (22) matter that there were a series of hearings in Allen Park on this issue."

The reason I say it's a catch-22 situation is this. If I hadn't responded to these letters — and perhaps I would have learned by this — then the people would have said, "Well, these arrogant federal judges, they never listen to anything that anybody says."

Instead I answered it and you said, "Aha, you are partial. You wrote letters to people in this case advocating a position."

What I did was, I attempted to answer the questions that they wrote: How did I reach the decision that I reached in this case? You see, that's what makes me wonder if the motivation here isn't, as this legislative history says, to see if we can't get some new blood into this case.

Mr. Feiler: I can only assure the Court that the purpose for this motion is because, as an officer of this Court and as an attorney representing a client, and the Court suggests that I am somehow saying, "Aha, you are prejudiced," or, "You are partial." Your Honor, it is nowhere in my motion — I am not suggesting that to the Court. All I am suggesting is on the objective tests enunciated by the 6th Circuit, an observer may well question —

The Court: Just because I answer an (23) observer's question? I can understand that the people of Allen Park, or many of them, are hopping mad about my decision. The question is whether or not there is a reasonable basis for your claim that I am not impartial. That's what I have to determine: Is there a reasonable basis for that?

Do I have to recuse myself because people think that way? I can understand that anybody who loses a case might well say, "We don't like that judge. We lost our case." It would take some stout-hearted citizen to walk out of the court room after he lost the case to say, "Boy, that was a pretty good judge. He did the right thing."

You know that that's not human. I understand what the people in Allen Park are saying, but because they are saying it or because they are believing it is not a basis on which I can act unless there is a reasonable basis for their belief.

Is there a reasonable basis —

Mr. Feiler: Your Honor, I think there is.

The Court: For me to recuse myself in this case?

Mr. Feiler: Your Honor, I think there is a basis in this record.

The Court: Is it a reasonable basis?

Mr. Feiler: Certainly a basis for a question.

The Court: Is it a reasonable basis?

(24) Mr. Feiler: Your Honor, I don't believe that's the test.

The Court: That's what the legislative history suggests. The Congress, when it enacted this statute — that's what I am reading from, the legislative history.

Mr. Feiler: Your Honor, I am going by the portion of the decision in *Roberts*, page 129.

The Court: Well, let's not talk about *Roberts*, because while I respectfully disagree with your position, you know — on *Roberts* — I don't think there is any good served in that. I agree with you straightaway that if Mr. Moon were to be a witness in the present case, *Roberts* would apply. If he were a defendant or if he were a principal witness, then you might argue *Roberts* to me. But he is not in the new case. He is a lawyer — and I don't mean that in any perjorative sense. His credibility as a witness is not in issue. He is not going to be a witness in the new case — and you say there is not dispute about his credibility as a witness in the old case.

Mr. Feiler: Your Honor, I would suggest to the court that that question becomes a very close one in this

apportionment case only for the reason that Mr. Moon was so intimately involved with the actual apportionment, the very decision that the Court is being asked to review.

The Court: So, he was intimately involved.

(25) Mr. Feiler: He expressed opinions; he assisted in the formulation —

The Court: Then your motion is a motion for a new trial of the old case, isn't it, not a motion for me to recuse myself in the new case?

Mr. Feiler: That's all our motion is today, your Honor.

The Court: Is that really the vehicle that you should employ? I mean, if he was so intimately acquainted or involved, what you are in effect saying is because he was, therefore, the decision that I reached in the old case is in some way tainted, right? Isn't that what you are getting at?

Mr. Feiler: Tainted under Rule 455(a).

The Court: Pardon?

Mr. Feiler: Tainted under 28 USC, 455.

The Court: Well —

Mr. Feiler: The Court knows that I respectfully disagree with the Court's ruling.

The Court: Aren't you questioning my decision in the old case?

Mr. Feiler: Not on this motion, your Honor. All we are suggesting, your Honor, is that there has been a separate action filed and there have been certain reported occurrences, the letters that the Court has mentioned, and (26) some of the comments. This is a case which is marked by a great deal and a very intense public interest, that if Rule 455 (a) is designed not to protect impartiality but to protect the appearance of impartiality, then it would seem a clear case for the Court to consider a recusal and allow another judge of this court to hear this apportionment case.

It is a separate case, started in a separate court, brought here by a removal proceeding under the Court's pendant jurisdiction. One has not anything, necessarily, to do with the other in terms of legal issues. The fact that the parties are the same parties — they are in different positions in the case. I don't think at this point it goes back to the first case.

The Court: All right.

Mr. Feiler: And some of the response that we filed, I mentioned to the Court, I frankly hoped the Court would raise your eyebrows a little bit at some of the things we did mention in our response. But at this point on this case it is strictly post judgment proceedings, and maybe the Court just didn't feel that that was warranted at that time.

But what we are dealing with in the apportionment case is a new, separate case in which the Court sits in a different capacity. And it seems to me, your Honor, if there is even the slightest question on a case of this amount of public concern, where it's a clean case, a separate (27) file, that 455 (a) and the *Roberts* decision would motivate in favor of a recusal on this case.

The Court: All right. I think I have your position.

Mr. Feiler: Thank you, your Honor.

The Court: Let me ask any of the counsel — and I want you to be blunt and outspoken — if any of you feel — because you have a position to occupy in this case — that I should recuse myself? It would make a difference to me if you felt that way.

Mr. Overman: Your Honor, the EPA wuld strongly request that the Court stay on the case. We have no problem.

Mr. Tiplady: That's the same position for the Drain Board.

The Court: Perhaps I asked the question wrong. I don't mean, "How about it." I am talking about Mr. Feiler's concern. Do any of you share this and see that at the end of this hearing, should I stay in the second case, that your position might be less strong than it would be if some other judge reviewed this record as if on certiorari? I don't feel any duty to sit in the case if any of you have any compunction about it at all, and I would welcome your expressing yourselves on that. Because the last thing in the world, it seems to me, that this case needs, whoever (28) decides it, is more delay. There has been enough of that.

Mr. Moon: May it please the Court. Charles Moon, counsel for the Drainage District in the apportionment proceedings.

I believe the problem arises out of the peculiarity of the Drain Code and of the practice of municipal law in the sense of the issuance of bonds, in that a bond attorney, and that has been my capacity in this matter, in order to — nowadays, at least, in order to have them marketed, must participate in the proceedings out of which the bonds develop and supervise the necessary steps which are required under the applicable law in order for the bonds to be issued and sold, and in order for him then to say that the bonds are valid and binding in accordance with their terms under applicable law. And for that reason, bond counsel must go through the steps after this.

After this Court decided the case which is now on appeal, the Drainage District — and it appears in the record now before this Court — employed me and my firm as bond counsel to proceed forward to issuance of bonds in accordance with the order of this court and in accordance with request of the EPA and the DNR, and in

accordance with the petition that had been filed several years ago by the various municipalities in the area to finance the second segment of element two. And after being so employed, and (29) the contract is in the record —

The Court: Well, he said that you were employed in that capacity even before you testified here as an amicus.

Mr. Moon: Well, that is not true that I was and I don't think he is quite saying that either. I think he is saying that I was involved in the proceedings in a way which meant that I was in favor of something and against something else. And the fact is, as was displayed in the record of this Court, that when the segment number one was — well, start at the beginning — when the whole process started, I was one of the bond counsel for the Drain District. We went up to the point where there was litigation filed by the City of Allen Park, and that litigation was settled by segmentation, so that you got into segment one and segment two.

Segment one went ahead. Bonds were issued. I signed an opinion on these bonds and delivered them, and the bonds were issued in the amount of $19 million or whatever it was. Then — that was the end. Segment two languished, and I guess there was a record, and finally culminating in the litigation which came before this Court on segment two, about which I had no official capacity until the question arose, as I stated in the Brief Amicus Curiae, it has always been my belief, and I so state it, that an Amicus Curiae is on behalf of someone who has an interest in the litigation. (30) It may be a party or it may be a company which has a situation similar to the party who may want to express a view. But I don't think an Amicus Curiae is just a lawyer who expresses, as a matter of public or private service, his view on something.

I think he has to come in as an Amicus Curiae for X, and in this case it was for the Drain Commissioner.

The Court: But you understand at that point Mr. Feiler is saying that your firm was also a consultant to the Drain Commissioner.

I believe that's your position, that they were being paid by the Drain Commissioner?

Mr. Moon: I was amicus for the Drain Commissioner and I was paid by the Drain Commissioner; that's correct, as, again, a peculiarity of the Drain Code and drain law in the state. The Drain Commissioners and the drainage district in this state are entities but they are entities without power. And they can get power only from two sources, either an order of the Court or a petition. And in the case of either case, they then act or petition or order. So, they have no independent power.

But representing the Drainage District does not give you any independent position because there is no power until something happens. So, there was no power in this Drainage District here to proceed, really, until this Court ordered them to proceed.

(31) And at that point they then went out and hired counsel; they hired financial consultants and bond counsel to proceed. So, at that point I did become an advocate again for a certain set of procedures. But what I am advocating is valid bonds. I am not advocating that either one person or another should have something happen to them. And for that, what I am indicating is that the apportionment proceeding is a valid apportionment, and that's the point we are at now. Is the apportionment valid? Then if, yes, then we issue bonds, if not, we go back to reapportionment.

So, it is confusing to counsel of the type who are regular advocates of a particular position or who are litigants, but bond counsel are advocates for validity, you might say, and that is our point.

The Court: Anyone else?

Mr. Emery: Your Honor, on behalf of the Department of Natural Resources of the State of Michigan, I have listened attentively to Mr. Feiler's presentation and I did not hear any indication to me that the Court was not impartial in the prior proceeding or this proceeding, and have no concern about the proceedings that we have.

The Court: Anyone else?

The record that I think we have made this afternoon and on prior occasion relates to Plaintiff's motion for recusal pursuant to 28 USC 455 (a). Plaintiff (32) contends that I made comments on a prior hearing that indicate a bias in favor of the defendant Youngblood and his legal counsel, Mr. Charles Moon, that would affect my decision in the case presently before me. Plaintiff's second contention is that my impartiality in the decision of this case can be questioned as a result of a letter that I wrote after the conclusion of the first case to citizens who had written to me as a result of that litigation.

I have carefully reviewed the transcripts in this case and my actions following the resolution of that first case. As I pointed out — and I speak first and perhaps repetitively to the testimony that was given in the first case by Mr. Moon on the Drain Code and its application to the remedy.

When you, Mr. Feiler raised in this case some question as to the position that Mr. Moon had taken in that case, I responded to it, and my response is a matter of record. I think I was required to respond to the point that you raised because you raised it.

And then, having responded to it in the way in which I did, I don't see that that leads to a position of partiality. The writing of these letters to the citizens of Allen Park, I have already commented on and I don't believe that any further need is here now to comment on that in any further detail.

Whenever a motion to recuse is filed, I understand counsel's feeling or sensitivity with regard to it, and I want to assure you, Mr. Feiler, and your colleagues, that it really is not looked at by me as any kind of a personal reflection. I want you to know that, and the fact that you have brought this motion in no way will affect your standing in this Court either in this case or any other case that you might bring, because that's your duty as an advocate. I recognize that.

I don't believe, though, that because a motion that questions the judge's impartiality is filed, that that ought to be the end of the matter. I think I have a duty to investigate carefully into the reason or grounds.

I do not believe that my impartiality in this case is in any way affected by the comments that I have made as to Mr. Moon or the letters that I have written to the citizens of Allen Park who wrote me in good faith asking for the reasons for my decision. In both cases, I dealt with the matter when it was raised on the record. When I wrote to the citizens of Allen Park, I stated to them exactly how I had obtained the information and why I was submitting it to them. All of this is matter of record.

I have not dealt, in my veiw, extra judicially in this case, and, therefore, your motion, I must say reluctantly, is denied — because I have got to find some (34) way to get out of these sewer businesses. I haven't succeeded yet.

You may have an order.

We will be in recess.

(Hearing concluded)

(Certification Omitted)

82-1657

No._____

Office - Supreme Court, U.S.
FILED
MAY 16 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

CITY OF ALLEN PARK,

Petitioner,

v

ECORSE POLLUTION ABATEMENT DRAIN NO. 2 DRAINAGE DISTRICT, a body corporate and CHARLES N. YOUNGBLOOD, Wayne County Drain Commissioner,

Respondents.

RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

DO STATEMENTS AND ACTIONS BY A UNITED STATES DISTRICT COURT JUDGE, MADE AND TAKEN IN THE COURSE OF PROCEEDINGS TO CARRY OUT AND TO ENFORCE THE INJUNCTIVE POLLUTION CONTROL MANDATES OF HIS PREVIOUSLY ENTERED FINAL ORDER AND JUDGMENT AND PURSUANT TO RETAINED JURISDICTION TO IMPLEMENT THE JUDGMENT, TO THE EFFECT THAT HE WILL INSIST UPON COMPLIANCE WITH THE FINAL ORDER AND JUDGMENT "FORTHWITH" AND THAT THE OFFICERS AND BOARD MEMBERS OF DEFENDANT DRAINAGE DISTRICTS AND THE OFFICERS, CITIZENS AND RESIDENTS OF THE DEFENDANT CITY ALL MUST PROCEED FORTHWITH TO ACQUIRE AND TO FUND THE MANDATED POLLUTION CONTROL FACILITIES, CONSTITUTE A BASIS FOR REASONABLY QUESTIONING THE IMPARTIALITY OF THE JUDGE SO THAT HE SHOULD RECUSE HIMSELF FROM PRESIDING IN FURTHER ENFORCEMENT PROCEEDINGS OR IN PROCEEDINGS TO EXAMINE AND REVIEW, BY APPEAL IN THE NATURE OF COMMON LAW CERTIORARI IN MICHIGAN (ON THE BASIS OF PENDENT JURISDICTION AS RETAINED IN THE FINAL ORDER AND JUDGMENT) ACTIONS OF BOARD MEMBERS OF ONE OF THE DEFENDANT DRAINAGE DISTRICTS TAKEN IN FURTHERANCE OF THE INJUNCTIVE MANDATE AS ABOVE STATED?

II.

DOES A RECUSAL MOTION UNDER 28 USC § 455(a) REQUIRE AN OBJECTIVE EVALUATION OF THE APPEARANCE OF PARTIALITY BASED ON A REASONABLE LOCAL OBSERVER AND IF SO, MAY THE COURT OF APPEALS DENY RECUSAL *de novo* WHERE THE TRIAL JUDGE HIMSELF UTILIZED A SUBJECTIVE TEST AND WITHOUT ANY RECORD AS TO LOCAL STANDARDS, CUSTOMS, PRACTICES OR CONTROVERSIES?

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CITATIONS TO THE OPINIONS AND JUDGMENTS BELOW

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State of Mich. v. *City of Allen Park*, 501 F. Supp. 1007 (ED Mich 1980), *aff'd* 667 F2d 1028 (CA 1981), *cert. denied*, 72 L Ed 2d 443 (1982).

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*The symbol "RA" refers to Respondents' additions to the Appendix attached hereto.

JURISDICTION

Jurisdiction is vested in this court pursuant to Section 505 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C § 1365(a) ("FWPCA"), and 28 U.S.C. § 1331, in that the amount in controversy exceeds the sum or value of $10,000 and arises under the Constitution, laws or treaties of the United States. Pendent jurisdiction exists for the state law claims and relief sought under the Water Resource Commission Act, M.C.L. § 323.7(1) (M.S.A. § 3.527(1)); the Drain Code, M.C.L. § 280.461 *et seq.* (M.S.A. § 11.1461 *et seq.*); and the Court Order Bond Act, M.C.L. § 123.247 (M.S.A. § 5.2267). The plaintiffs seek a declaratory judgment under 28 U.S.C. § 2201 and injunctive relief under 28 U.S.C. § 2202.

The City of Allen Park seeks recusal of United States District Court Chief Judge Feikens pursuant to 28 USC § 455(a), and files the Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Those statutes, Federal and Michigan, specified above in the statement of jurisdiction and the enforcement provisions of Federal Water Pollution Control Act § 309,33 U.S.C. § 1319 and Michigan Compiled Laws § 323.3, (M.S.A. § 3.523).

STATEMENT OF THE CASE

A.

The United States District Court For the Eastern District of Michigan, Southern Division, Chief Judge John Feikens, Presiding, and the United States Court of Appeals For The Sixth Circuit have heard and decided two contested matters involving the City of Allen Park and its counsel who are now filing this second Petition for Writ of Certiorari in The Supreme Court of the United States. See earlier denial of Certiorari by this Supreme Court of the United States, as reported in 72 L. Ed. 2d 443 (1982).

In the first contested matter, chronologically, the City of Allen Park was one of the defendants in two civil actions, consolidated for hearing (501 F. Supp 1012) and fully reported in *State of Michigan, et al.* v. *City of Allen Park, et al.*, 501 F. Supp 1007 (ED Mich 1980) *aff'd* 667 F. 2d 1028 (CA 1981), *cert. denied* 72 L.Ed. 2d 443 (1982). The Final Order and Judgment entered by Chief Judge Feikens in this first action (RA-1)* contains in its first four paragraphs (A., B., C. and D.) mandates addressed to the defendants, Wayne County (Michigan) Drain Commissioner, The Le Blanc Tile Drainage District and The Drainage District for the Ecorse Creek Pollution Abatement Drain No. 1. These mandates direct and require these defendants forthwith to fund and to construct the county drain project identified as Element II Facilities Plan, Alternative 1, in its entirety, including without limitation, contracts 1-5 and a project for a retention basin. The mandates expressed in paragraphs B. and C. (RA-2) also direct and require the defendant City of Allen Park to participate in the funding and construction of the drain project and to pay this City's share of the funding by levy of tax to the extent necessary.

*The symbol "RA" refers to Respondents' additions to the Appendix attached hereto.

On May 20, 1981, in this first action (*not in the action now before this Supreme Court of the United States*) the parties appeared before Chief Judge Feikens for hearing on a motion by the State of Michigan seeking to force speedy compliance with these mandates in the Final Order and Judgement of June 30, 1980. (RA-1, A-42-46 and 55 et seq.). The thrust of this motion was against the defendant Wayne County Drain Commissioner and against the two drainage districts. The complaint of the State of Michigan was that these defendants were not acting speedily enough, were not acting "forthwith". (A-55 & 56). At that time, over a year after the trial of and decision in this first action by Chief Judge Feikens (501 F.Supp. 1007 and RA-1) and after the defendants drain commissioner and drainage district had taken many actions and procedures to comply with the mandates of the Final Order and Judgment (518 F. Supp. *1080*), the City of Allen Park and its counsel professed wonderment at the presence in court of bond counsel for one of the defendant drainage districts and complained of the actions of the Chief Judge in answering (A-39) a large number of letters, purportedly from citizens of the City of Allen Park, questioning the Chief Judge about his decisions and mandate against the City (A-62 and 63, and A-42 and 43).

The proceedings and hearing occurring on May 20, 1981, (A-42-46 and A-53-79) dealt with the enforcement by Chief Judge Feikens of his Final Order and Judgment of June 30, 1980, not with the review by Chief Judge Feikens on pendent jurisdiction grounds by certiorari, of a Final Order of Apportionment entered by the Drainage Board of one of the defendant drainage districts in drain proceedings conducted under state law. The bias and impartiality of which the City of Allen Park and its counsel complain is that Chief Judge Feikens has urged, *in fact* has *demanded*, that his orders must be obeyed and carried out.

ARGUMENT

A.

Because a United States District Court Judge is not likely to be recused for demanding that his orders be obeyed or for further proceedings after judgment in a matter in which jurisdiction is retained (RA-3), the City of Allen Park and its counsel appear to have embarked upon a program to bait the Judge and cause further delay and difficulty. Thus, the attempt to claim in the first of the Questions Presented (Pet.-1) that the "extra judicial contacts" were by the Judge with the residents, whereas in fact the residents wrote to the Judge in such legalistic form* and at such a common time as to appear organized and orchestrated. (A-93 and 94).

A judgment against a city is binding on all of its citizens and residents whom the city is deemed to represent, 50 C.J.S. Judgments § 796, at p. 338, as quoted and applied in *Stromberg* v. *Board of Education*, Ohio Sup. Ct., 413 N.W. 2d 1184 (1980); *Roberts* v. *Goldner*, N.J. Sup. Ct., 397 A. 2d 1090 (1979). So we have a situation in which parties in an action pending by retained jurisdiction are directly contacting the judge, not through their counsel and not in the presence or with the knowledge of other counsel. That is the improper extra judicial contact, not the reply of the judge.

Chief Judge Feikens had an obligation to warn all of the parties to the first action involving pollution control that his Final Order and Judgment was binding and must be obeyed. In particular it was his duty to explain to and warn the City of Allen Park and its citizens and residents that its leadership and its counsel were not carrying out their duty to comply with the Court's Order and Judgment. Such action can scarcely be grounds for

*The common complaint of the letter writers was that they had no hearing as an individual on the necessity of and plans for the project. (A-94)

recusal, else no orders and judgments will ever be obeyed.

It should also be noted that counsel for the City of Allen Park commence statement of the first of the Questions Presented (Pet.-i) by the words "In a highly controversial case", as a basis to urge that Chief Judge Feikens should be recused for creating "controversy" and therefore an appearance of partiality and bias. However, it should also be noted that this "controversy" is only one instance of an artificial controversy being developed in these lengthy proceedings. All of these contrived controversies have no relevance to the merits of the pollution abatement problem and have served, apparently by design, to delay for six years the commencement of acquisition of pollution abatement facilities in the City of Allen Park. In the neighboring cities, acquisition commenced within two years and is now essentially complete but pollution will not be abated until the final Allen Park link is also completed.

The voluminous two volume joint appendix submitted to the Court of Appeals for the Sixth Circuit contains many transcripts of public hearings and minutes of public meetings detailing hours of "controversy" and demonstrations (A-70) which were totally irrelevant to the purpose of the public hearings or of the public meetings. Whether such activities were controlled or uncontrolled, they demonstrated in either case, as Chief Judge Feikens pointed out in his letter to citizens (A-39) and in his remarks in open court (A-45 and 63), that the officers and counsel for the City of Allen Park were not properly advising the citizens and residents of the City of the binding effect, subject to rights of appeal now concluded, of the Final Order and Judgment.

However, the controversies came into being in the City of Allen Park and whatever the reasons for the reactions of the citizens and residents of the City, this

cannot and does not create the milieu in which to seek an "objective" test of a perception of bias or impartiality as to a United States District Court Judge who has ordered these citizens and residents to do something they appear not to want to do. This is a classic example of an attempt to remove a District Court Judge "to avoid the consequences of his expected adverse decision". (A-92) Or to convince a District Court Judge "to avoid sitting on difficult or controversial cases". (A-92).

That the actions and reactions of Chief Judge Feikens and of the citizens and residents of the City of Allen Park are not grounds for recusal, voluntarily or on motion, pursuant to P.L. 93-512, 28 U.S.C. § 455 *et seq.* can scarcely be better stated than it has been in the legislative history of that Public Law reading as follows:

> "While the proposed legislation would remove the 'duty to sit' concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.
>
> "At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of the litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not to have

to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges to their own choice.

"Finally, while the proposed legislation would adopt an objective test, it is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." 3 U.S. Cong. & Adm. News, at 6355 (93rd Cong., 2d Sess., 1974) (Emphasis in original.)

B.

By claiming that he, and therefore presumably every other citizen and resident of the City of Allen Park, was confused as to the relationship of attorney Charles R. Moon (one of the writers of this Response) to the motion by the State of Michigan heard on May 20, 1981, *not in the case in which this Petition For Writ of Certiorari is filed*, but in the earlier case reported in 501 F. Supp. 1007, counsel for the City believes that he elicited remarks from Chief Judge Feikens which demonstrate bias and partiality.

In his argument to the District Judge, counsel for Petitioner introduced the interesting concept of a "neutral *amicus curiae*" (A-85 and Petition p.7). It may have once been true in legal history that there could be or was an attorney who appeared in court, without client and cause, to advise a court in an academic sense about particular problems before the court. However, this was never the situation in these proceedings. In the trial of

the first contested matter, reported in 501 F. Supp. 1007, the appearance by Mr. Moon is clearly stated to be as follows:

> "Brief Amicus Curiae on Behalf of Charles N. Youngblood, Wayne County Drain Commissioner And Chairman of the Drainage Board for the Drainage District for the Ecorse Creek Pollution Abatement Drain, a Michigan Public Corporation" (RA-3). (From CA6 Joint Appendix p. 601)

The *amicus curiae* is at all times Charles N. Youngblood, the Wayne County Drain Commissioner, and not Charles R. Moon, the bond counsel who represented the Wayne County Drain Commissioner and wrote the Brief *Amicus Curiae* filed on behalf of the Drain Commissioner.

This counsel for Petitioner admitted reluctantly that he knew. (A-84 and 85) Counsel for Petitioner also knew that, commencing on September 17, 1980, and continuing up to the May 20, 1981, enforcement hearing before the District Judge, Charles R. Moon was employed as bond counsel for the Drainage District for the Ecorse Creek Pollution Abatement Drain to assist and advise said Drainage District, a Michigan public corporation, in carrying out the injunctive mandates against it as set forth in paragraphs A., C. and D. of the Final Order and Judgment. (RA-2) Such activities by Mr. Moon as bond counsel made it necessary that he appear at the enforcement hearing to explain what actions the defendant Drainage District had or had not taken and why. None of this seems very unusual or very inimical to the interests of the co-defendant City of Allen Park. In fact, no assertions have been made or proof offered to show that such actions by Mr. Moon

prejudiced the City of Allen Park in any way, possibly because these actions are necessary to receipt of the substantial Federal and State Grants.

Now, however, in this Petition for Writ of Cetiorari to be issued by the Supreme Court of the United States, it is claimed that the drain proceedings including issuance of a Final Order of Apportionment of the costs of pollution abatement facilities, all as described in *City of Allen Park* v. *Ecorse Pollution Abatement*, 518 F. Supp. 1079 (1981), are irregular and improper and damaging to the interests of the City. (Petition pps. 8, 9, 10 and 14). Without explanation, these issues concerning the alleged defects in the drain proceedings and the Final Order of Apportionment are not included in the Petition for Writ of Certiorari, even though these issues were decided against the Petitioner by the District Judge (A-21) and by the Court of Appeals (A-4).

Also without explanation, *and without support of any facts or material in the record*, it is asserted that Mr. Moon appeared as an *amicus curiae*, sort of *sua sponte* as it were, "acting as a neutral *amicus* solely for purpose of advising the court", (Petition p. 7) and then it was discovered that his legal services were paid for by the Drain Commissioner. (A-44) This is a fact shown in the record all along (RA-8) but somehow not apparent to counsel for Petitioner City. Then assertion is now made (Petition p. 8) and repeated over and over (Petition pps. 9, 10 and 14) that Mr. Moon is "largely responsible for" or "intimately involved with" or "directly responsible for" or "played a significant role in actually formulating" the apportionment decision which is now allegedly wrong and erroneous even though there has been no further appeal from the decisions of the District Court Judge and the Court of Appeals panel of Judges which confirmed the Final Order of Apportionment. (A-7 and A-30)

Nowhere is there any fact to support the assertion that Mr. Moon made or directed the apportionment decision, a decision which by its nature is not based on legal principles but on economic and engineering matters. Reference is made to page 211 of the Joint Appendix filed in the Court of Appeals for the Sixth Circuit (RA-10) where appears the paragraph taken from the minutes of the public hearing on apportionments held on November 12, 1980, reading as follows:

> "At the request of Kenneth D. Kruse, attorney for the City of Allen Park, it was agreed by members of the Drainage Board that the hearing on apportionments should be recessed, after all persons present who want to speak have been heard, so that Mr. Kruse and other city officials can confer with Messrs. Trim and Shapiro and Bink to verify the method of apportionment and the calculations used therefor."

Messrs. Trim and Shapiro and Bink are all professional engineering consultants to the Drainage District. (RA-7).

By law the Drainage Board for the Drainage District must apportion the costs of the pollution abatement project, first tentatively (MCL § 280.468; MSA § 11.1468) and then by Final Order of Apportionment adopted subsequent to public hearing (MCL § 280.469; MSA § 11.1469). It is concluded by the District Court Judge in his opinion reported in 518 F. Supp. 1079, (A-26) as follows:

> "2. The apportionment of costs of the Drain Project are to be made by defendants, according to benefits and contributions by the public corporations involved herein, in percentages of said costs to be borne by each pubic corporation including the plaintiff, and there is nothing in the

Certified Record showing that the defendants did not so apportion the costs in accordance with their best judgment and without mistake or abuse of discretion or fraud or bad faith or in violation of law. (At page 1081)

"6. The burden rests with plaintiff to show by facts submitted to defendants in the hearing required by law, the reasons why and the extent and manner in which the tentative apportionments are invalid or improper so as to overcome the presumption that defendants, in exercising their discretion and judgment as required by law, acted properly and in accordance with that law. The plaintiff has not met that burden, and there is nothing in the Certified Record to show fraud, bad faith, dishonesty, abuse of discretion or failure to comply with applicable law on the part of defendants." (At page 1082)

These findings and conclusion are made by the District Court Judge in an appeal to him by common law writ of certiorari to review the decision of an administrative board. As previously noted with respect to proceedings to enforce an existing judgment, the test for recusal of a judge acting in such an appellate capacity has to be different than a test applied to a trial judge prior to trial.

Respondents respectfully submit that viewed in its proper context and "assessing all the facts and circumstances", the first of the Questions Presented by Petitioner to this Court deals not with bias or partiality of a judge but only with an open attempt by a litigant to have a judge of its own choice. There is no ground for recusal. Such is the correct judgment of the United States Court of Appeals for the Sixth Circuit (A-6) of which review by writ of certiorari is here sought and should be denied.

II.

DOES A RECUSAL MOTION UNDER 28 USC § 455(a) REQUIRE AN OBJECTIVE EVALUATION OF THE APPEARANCE OF PARTIALITY BASED ON A REASONABLE LOCAL OBSERVER AND IF SO, MAY THE COURT OF APPEALS DENY RECUSAL *de novo* WHERE THE TRIAL JUDGE HIMSELF UTILIZED A SUBJECTIVE TEST AND WITHOUT ANY RECORD AS TO LOCAL STANDARDS, CUSTOMS, PRACTICES OR CONTROVERSIES?

A.

The purpose of this second of the Questions Presented appears to be to raise issues and to form a basis for arguments not based upon anything in the record before the United States District Court or before the United States Court of Appeals, except perhaps for some allegations, not record supported, and some arguments *first* presented in a document filed on behalf of Petitioner, sometime after November 29, 1982, in the Court of Appeals for the Sixth Circuit and entitled Petition for Rehearing and Suggestion for Hearing En Banc or in the Alternative, To Correct Record Opinion In This Court. (A-9)

One of these new issues and arguments is that the District Court Judge should have made a record, by testimony or in some means, as to what a "reasonable, objective observer" would feel about his impartiality and the fairness of the judicial proceedings (See Petitioner's Brief, pps. 17 and 18). This is indeed a strange and wondrous concept. In the first place, Petitioner moved for recusal and as moving party would seem to have the primary responsibility to make whatever "record" is required to support the motion. Of course there is no offer of proofs by Petitioner in the court records, not even the presentation of affidavits. The idea that the District Judge, or even the Court of Appeals in a *de novo* hearing, should have supplied this proof is indeed novel.

Beyond that, it is clear that here again the counsel for Petitioner is trying to assert that the District Judge shows bias and partiality when he tells officers, citizens and residents of the defendant City that they must obey his Final Order and Judgment against them and they loudly reply, "That is not fair, you are biased against us!" (A-95)

The second idea which counsel for Petitioner City of Allen Park appears to be now trying to advance is the idea that the City cannot have a fair trial because "everyone is against us". The trial, of course, is over and the City feels it has lost even though the required abatement of pollution should be an ultimate advantage to it. It is probably true that the City at this time has few "friends". Its neighboring cities have spent large sums and incurred large obligations to abate pollution but the reluctance of the City of Allen Park to do likewise has deprived its neighbors of the full benefits of these expenditures. The State of Michigan is also not very happy with the City or any of the other defendants, for that matter, for not obeying their orders, rules and regulations. The City may really have difficulty finding a friend or a supporter at this time and in this southeastern Michigan area, but is that bias or partiality? No doubt the City and its citizens and residents "wish the whole thing would go away" and many probably feel that the first thing to do is "to get rid of that Judge". (A-95)

If recusal under § 455(a) is truly "designed to protect the public — and ultimately therefor, the administration of justice itself", (Petitioner's Brief, p. 22) then it can never be used to remove a Judge so as to prevent him from enforcing and carrying out a Judgment against the party seeking his recusal.

B.

Counsel for Petitioner strangely states two propositions in support of recusal and then sets forth citations of and quotations from cases decided by the Court of Appeals for the Sixth Circuit which really hold to the contrary.

First, counsel for Petitioner asserts at page 15 of its brief that "the trial court's resort to legislative history was totally improper". This immediately follows a quotation form *Roberts* v. *Bailar*, 625 F. 2d 125 (6th Cir. 1980), the principal case on which counsel for Petitioner relies throughout the brief, which reads, in part, as follows:

> " 'If there is a reasonable factual basis for doubting the judges impartiality,' the Congressional Committee reports on the 1974 amendment to § 455 explain, the judge 'should disqualify himself and let another judge preside over the case' ". (*Roberts, supra*, 625 F 2d at p. 129)*

Second, counsel for Petitioner asserts at page 16 of its brief, "that extra-judicial statements or conduct may be a basis for disqualification". This statement is followed by the citation of several cases, including one from the 6th Circuit Court of Appeals, *Bradley* v. *Milliken*, 620 F. 2d 1143 (6th Cir. 1980), from which the Court of Appeals is quoted as holding as follows:

> "To make out a case for recusal under § 455(a), a movant must rely on *extra-judicial* conduct rather than matters arising in a *judicial context*". (emphasis added) (620 F. 2d at p. 1157)

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*See also the lengthy quotation in Petitioner's brief on pps. 19, 20 and 21 where again legislative history is discussed to justify the decision of a United States District Court in Idaho.

The foregoing assessment in this brief for Respondents of "all the facts and circumstances" demonstrates clearly that the conduct of Chief Judge Feikens on which Petitioner relies all arose in a *judicial context* in the very process of enforcement of injunctive pollution control mandates pursuant to retained jurisdiction to implement a Judgment. Recusal was denied and the denial affirmed in *Bradley, supra,* (ex parte contacts) and in a litany of other recent cases in which, in several cases, "all the facts and circumstances" were far more compelling than those in this case. See for example the following:

> *Southerland* v *Irons*, 628 F2d 978, 980 (CA6 1980) (involvement in previous suit); *Schultz* v *Newsweek*, 668 F2d 911, 919 (CA 1982) (defendant's news article favorable to judge); *In Re International Business Machine Corp*, 618 F2d 923, 927-932 (CA 1980) (child-like innocence not required, sporadic flare-ups toward counsel); *United States* v *Heldt*, 668 F2d 1238, 1269-1274 (CADC 1981) (alleged concealment of security measures); *United States* v *Phillips*, 664 F2d 971, 1000-1004 (CA5 1981) (ex parte contacts); *Hagans* v *Andrus*, 651 F2d 622 (CA9 1981) (comment in sex discrimination case that plaintiff went a long way before encountering discrimination); *Matter of George Paneling Supply, Inc.*, 581 F2d 520, 522 (CA5 1978) (ex parte conference); *In Re United States*, 666 F2d 690, 695 (CA1 1981) (prior relationship between judge and defendant); *United States* v *Coven* 662 F2d 162, 168 (CA2 1981) (knowledge of evidence from prior proceeding); *United States* v *Conforte*, 624 F2d 869, 878-879

(CA9 1980), *cert. denied*, 449 US 1012 (1980) (rejection by judge of bridge club application and refusal to seek funds for college from defendant owner of house of prostitution); *Ma* v *Community Bank*, 686 F2d 459, 472 (CA7 1982) (judge lived in Depere, Wis. same town as bank's attorney and knew the bank attorney had practiced law a considerable time); *Huff* v *Standard Life Ins. Co.*, 683 F2d 1363, 1369-1370 (CA11 1982) (judge's previous affiliation with defendant's law firm no abuse of discretion); *In Re Federal Skywalk Cases*, 680 F2d 1175 1183-1184 (CA8 1982) (ex parte telephone calls to counsel asking if his client would serve as class representative, if a class was certified. Claim of bias must be evaluated in light of the full record and not an isolated incident).

CONCLUSION

This Petition for Writ of Certiorari presents, therefore, no instances of judicial error and no facts and circumstances of any unusual nature with respect to which this Supreme Court of the United States should examine the question of recusal of a United States District Court Judge.

Petitioner in its Questions Presented and in its Statement of the Case and its Argument does not present "all the relevant facts" as required by the United States Court of Appeals for the Sixth Circuit (A-6) or "all the facts and circumstances" to be assessed "in order to determine whether the failure to disqualify was an abuse of sound judicial discretion," as Congress intended in enacting P.L. 93-512, 28 U.S.C. 455 *et seq.* 3 U.S. Cong. & Adm. News, at 6355 (93rd Cong., 2d Sess. 1974).

Therefore, it is respectfully requested on behalf of Respondents that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in this matter be denied.

Respectfully submitted,

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VAN DUSEN & FREEMAN
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Dated: May 10, 1983

RESPONDENTS' APPENDIX

FINAL ORDER AND JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed July 1, 1980)

(State of Michigan, The Administrator of the United States Environmental Protection Agency, Greenfield Construction Company, Inc., Lanzo Construction Company, Inc., Giannetti Construction of Michigan, Inc., and Rocco Ferrera & Company, Inc., Plaintiffs, vs. The City of Allen Park: The Le Blanc Tile Drainage District: The Drainage District for the Ecorse Creek Pollution Abatement Drain No. 1; The County of Wayne; Charles N. Youngblood, the Wayne County Drain Commissioner, Defendants — File No. 79-74681; State of Michigan, Robert Lindisch and Phil Serpetti, Jr., Plaintiffs, vs. The City of Allen Park, Michigan, a Michigan municipal corporation, Defendant — File No. 79-74682)

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on the 30th day of June, 1980.

Present: Honorable John Feikens
Chief Judge, U.S. District Court

This action came before the Honorable John Feikens for trial; testimony, documentary evidence, briefs and arguments of counsel were received and considered, the Court having on May 14, 1980 issued findings of fact and conclusions of law on the record, the court now orders and adjudges as follows:

A. It is Ordered and Adjudged that the defendant drainage districts and the defendant drain commissioner

shall proceed forthwith to fund and construct the Element II Facilities Plan, Alternative 1, in its entirety, including without limitation, contracts 1-5 and a project for a retention basin.

B. It is Further Ordered and Adjudged that the City of Allen Park shall forthwith participate in the funding and construction of the Element II Facilities Plan, Alternative 1, in accordance with its terms, including without limitation, contracts 1-5 and a project for a retention basin.

C. It is Further Ordered and Adjudged that pursuant to the State of Michigan Court Order Bond Act, Act No. 320 of the Public Acts of 1927, as amended, and the State of Michigan Drain Code, Act No. 40 of the Public Acts of 1956, as amended, defendant drainage districts and the defendant drain commissioner shall apportion and assess the cost of the Element II Facilities Plan, Alternative 1, including sewer separation in the City of Allen Park against the public corporations benefitted, which includes the City of Allen Park, and that upon being so assessed the City of Allen Park shall in each year provide funds necessary to meet such obligation, which may include but is not necessarily limited to the levying of a tax on all taxable property in its jurisdiction in an amount necessary to pay the amount payable on the assessment for that year and that such tax shall be levied without limitation as to rate or amount. That such tax, being for the purpose of public health and safety is not subject to public referendum pursuant to Article IX section 6 or sections 25 through 34 of the 1963 Michigan Constitution as amended.

D. It is Further Ordered and Adjudged that the defendant drain commissioner and the drainage districts aforesaid shall immediately proceed to locate and obtain

appropriate MDNR and EPA approval and to redesign and construct the project for a retention basin as defined in the Element II Facilities Plan, Alternative 1.

E. It is Further Ordered and Adjudged that the City of Allen Park's cross-claim against USEPA is dismissed.

F. It is Further Ordered and Adjudged that due to the urgency of this action and the serious public questions involved this court will retain jurisdiction for the purpose of implementing the Judgment.

/s/ John Feikens
Chief Judge, U.S. District Court

Pages 601 and 602 – Joint Appendix, CA6

INTRODUCTION AND REQUEST FOR PERMISSION TO FILE BRIEF AMICUS

In this matter, the Chief Judge presiding has asked Counsel for various of the parties to obtain through the office of the Wayne County Drain Commissioner a discussion of the principles of State law and of the requirements of the municipal bond market which bear upon the legal power and the practical aspects involved in possible orders issued and remedies invoked by the Federal District Court. The purpose of this Brief Amicus Curiae is not to take a partisan position in the litigation on the merits nor to participate in any dispute of fact or law as pleaded or proved. Therefore, factual statements in this Brief Amicus Curiae are assumptions and premises for the purposes of discussion, except for those facts which are items of public record in the office of the Wayne County Drain Commissioner or of the City Clerk of the City of Allen Park or in the records of this Federal District Court.

Permission is hereby requested to file this Brief Amicus Curiae on behalf of Charles N. Youngblood, Wayne County Drain Commissioner and Chairman of the Drainage Board for the Drainage District for the Ecorse Creek Pollution Abatement Drain, a Michigan Public Corporation. As will appear herein, the actions and activities of the Amicus Curiae during the years 1977 and 1978, in particular, are most pertinent as explanations of the background out of which this present litigation has grown. Because the Amicus Curiae became, by the processes and provisions of the pollution control grant programs of the U.S. Environmental Protection Agency (EPA) and the Michigan Department of Natural Resources (DNR), the lead applicant to make application for, accept and expend the pollution abatement grants from the EPA and DNR, this Amicus Curiae has been and presumably still is one of the principal actors in the recognition, definition and solution of the issues presented in this litigation for this Federal District Court to resolve. In requesting permission to file this Brief Amicus Curiae, this Amicus Curiae is renewing and re-affirming in his official capacities herein named, his continued availability and willingness to continue as lead applicant for the pollution control grants and as the financing and acquisition vehicle for the required pollution abatement facilities as determined by this Federal District Court and as permitted by law.

RA-5

Pages 44-48 – Joint Appendix, CA6

ECORSE POLLUTION ABATEMENT
DRAIN No. 2 DRAINAGE DISTRICT PROCEEDINGS

(United States Court of Appeals
for the Sixth Circuit)

(City of Allen Park, a municipal corporation, Plaintiff-Appellant, vs Ecorse Creek Pollution Abatement Drain No. 2 Drainage District, a body corporate, and Charles N. Youngblood, Wayne County Drain Commissioner, Defendants-Appellees — Case No. 81-1554; L.C. No. 81-70353)

1. Meeting of Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 held September 17, 1980.
2. Minutes of the Meeting of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2, held November 12, 1980.
3. Ecorse Creek Pollution Abatement Drain No. 2 Public Hearing for the Allen Park Apportionment November 12, 1980.
4. Minutes of the Meeting of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 held December 10, 1980.
5. Ecorse Creek Pollution Abatement Drain No. 2 Public Hearing for the Allen Park Apportionment held December 10, 1980.
6. Minutes of the Meeting Ecorse Creek Pollution Abatement Drain No. 2 Drainage Board held December 17, 1980.
7. Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 held December 29, 1980.

8. Minutes of the Meeting of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 held December 29, 1980.

Sempliner, Thomas, Tiplady and Boak
Attorney for Defendant
By: /s/ Robert P. Tiplady P25760
711 West Ann Arbor Trail
Plymouth, MI 48170
455-4560 or 453-6220

A meeting of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 was held at the office of the Wayne County Drain Commissioner, 900 W. Lafayette, Detroit, Michigan, 48226, at 10:00 A.M., Eastern Daylight Time, on Wednesday, September 17, 1980.

The meeting was called to order by the Chairman, Charles N. Youngblood, at 10:00 A.M., E.D.T.

Present: Charles N. Youngblood, Chairman, Wayne County Drain Commissioner; Ted Mrozowski, Vice Chairman, Wayne County Board of Auditors, as per Section 464 of Act 285 of Public Acts of Michigan of 1970; Clemens E. Bykowski, Vice-Chairman, Wayne County Board of Commissioners, as per Section 464 of Act 285 of Public Acts of Michigan of 1970.

Also Present: *Wayne County Drain Commissioner's Office* — Jeffrey Supowit (Counsel), Robert Jarrett (Chief Engineer), Mike Bink (Civil Engineer IV), Albert Mardirosian (Accountant V), Anna M. Pfefferle (Special Drain Planning and Grant Coordinator), Henrietta Wypiszewski (Secretary to Mr. Supowit); Charles R. Moon, Dickinson, Wright, McKean, Cudlip & Moon; Jack H. Cvengros, Stauder, Barch & Associates; Nate Shapiro, Consulting Engineering Associates, Inc.; Chester C. Piece, Consultant; Herbert Lamkin, Wade,

Trim & Associates, Inc.; Larry Berg, Attorney for Greenfield Construction Company, Inc.; Angelo DiPonio, Greenfield Construction Company, Inc.

This meeting is being recorded by Consulting Engineering Associates, Inc., by order of the Drainage Board and the tape is being held as a permanent record of this meeting.

The Chairman presented the minutes of the meeting held on August 7, 1980, by the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2, for approval.

It was moved by Mr. Bykowski that the minutes be approved and placed on file. Supported by Mr. Mrozowski.

Motion carried by the following vote.

Ayes: Bykowski, Mrozowski, Youngblood

Nays: None

The Chairman presented excerpts from minutes of meetings held and of proceedings and resolutions aodpted (sic) by the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 1 which should be incorporated in and become part of the records of the proceedings of this Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2, and which are as follows:

1. Dated February 13, 1980:

The following resolution was offered by Mr. Kelly and supported by Mr. Bykowski:

Be it hereby resolved that the firm of Wade, Trim & Associates, Inc. be retained as engineers for the project and that the Chairman be empowered to execute contract with Wade, Trim & Associates, Inc.

Be it further resolved that the firm of Dickinson, Wright, McKean, Cudlip & Moon be retained as Bond Counsel and that the Chairman be empowered and directed to execute contract with Dickinson, Wright, McKean, Cudlip & Moon.

And be it further resolved that the firm of Shannon and Company be retained as Financial Consultants for the project and that the Chairman be empowered and directed to execute contract with Shannon and Company.

Adopted: Ayes: Kelly, Bykowski, Youngblood.
Nays: None.

Page 129 – Joint Appendix, CA6

It was moved by Mr. Bykowski that the foregoing excerpts of minutes, proceedings and resolutions taken from the records of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 1 be incorporated in and become part of the records, for all purposes, of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 to the same extent as though received and adopted by this Drainage Board.

Supported by Mr. Mrozowski

Motion carried by the following vote:

Ayes: Bykowski, Mrozowski, Youngblood

Nays: None

There was presented to the Drainage Board the Final Order and Judgment entered on June 30, 1980, in the U.S. District Court, Eastern District of Michigan, Southern Division, by Chief Judge John Feikens, * * *

Pages 163 and 211 – Joint Appendix, CA6

MINUTES OF THE MEETING OF THE DRAINAGE BOARD FOR THE ECORSE CREEK POLLUTION ABATEMENT DRAIN NO. 2

A meeting of the Drainage Board for the Ecorse Creek Pollution Abatement Drain No. 2 was held in the Allen Park City Hall, 16850 Southfield Road, Allen Park, Michigan, on the 12th day of November, 1980, at 6:00 o'clock P.M., Eastern Standard Time.

The meeting was called to order by the Chairman, Charles N. Youngblood at 6:00 P.M.

Present: Charles N. Youngblood, Chairman, Wayne County Drain Commissioner; Samuel A. Turner, Member, Chairman, Wayne County Board of Commissioners

Absent: Richard T. Kelly, Member, Chairman, Board of Auditors of Wayne County

Also Present: *Wayne County Drain Commissioner's Office* — Michael Bink (Engineer V), Henrietta Wypiszewski (Secretary to Mr. Supowit); Dave Sprow, Water Quality Division, Dept. of Natural Resources; Paul Zuger, Environmental Enforcement Division Dept. of Natural Resources; Mary Ellen Fallon, Dept. of Natural Resources; Jack H. Cvengros, Stauder, Barch & Associates; Charles R. Moon, Bond Counsel; Nate Shapiro, Consulting Engineering Associates, Inc.; Harry Barsamian, Consulting Engineering Associates, Inc.; Don Trim, Wade, Trim & Associates, Inc.; Herbert Lamkin, Wade, Trim & Associates, Inc.

* * *

Excerpt from Page 211 – Joint Appendix, CA6

At the request of Kenneth D. Kruse, attorney for the City of Allen Park, it was agreed by members of the Drainage Board that the hearing on apportionments should be recessed, after all persons present who want to speak have been heard, so that Mr. Kruse and other city officials can confer with Messrs. Trim and Shapiro and Bink to verify the method of apportionment and the calculations used therefor.

* * *

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MOTION FILED
MAY 2, 1983

No. 82-1657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF ALLEN PARK,
Petitioner,

vs.

ECORSE POLLUTION ABATEMENT DRAIN NO. 2 DRAINAGE DISTRICT, a body corporate and CHARLES N. YOUNGBLOOD, Wayne County Drain Commissioner,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR AMICUS CURIAE CONSTRUCTION COMPANIES IN SUPPORT OF RESPONDENTS

HYMAN, GURWIN, NACHMAN, FRIEDMAN & WINKELMAN
By: Abba I. Friedman
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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

Greenfield Construction Company, Inc., Lanzo Construction Company, Inc., Giannetti Construction of Michigan, Inc. and Rocco Ferrera & Company, Inc. ("the construction companies") request leave to file a brief amicus curiae in support of Respondents for the reason that this case is directly related to State of Michigan v City of Allen Park, 501 F Supp 1007 (ED Mich 1980) aff'd, 667 F2d 1028 (CA6 1981), cert. denied, 72 L Ed 2d 443 (1982). The construction companies were granted leave to file an amicus curiae brief in this case when it was briefed before the Sixth Circuit.

The State of Michigan case (in which the construction companies were plaintiffs and appellees) concerned the failure by Allen Park to timely complete a sewer separation project in violation of the applicable National Pollution Discharge Elimination System (NPDES) Permit issued by the State of Michigan. The district court entered an order requiring

Allen Park to Proceed immediately with the financing and construction of its segment of the project. See State of Michigan v Allen Park, 501 F Supp 1007 (ED Mich 1980).

The present petition relates to Allen Park's most recent challenge to the apportionment hearings held relating to requiring Allen Park to finance its share of the sewer separation project ordered in State of Michigan, supra. Completion of legal challenges to the apportionment proceeding is necessary before construction can start. Bonds cannot be sold to finance Allen Park's local share of the project costs while the present case is pending.

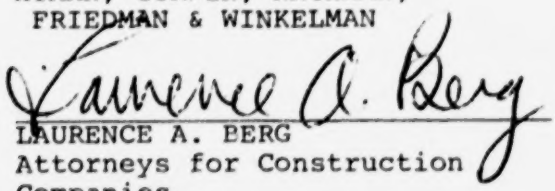
On July 15, 1981 Judge Feikens issued his Opinion, 518 F Supp 1079 (ED Mich 1981). The Opinion refers to and inextricably relates to the State of Michigan case. Construction cannot start until financing is resolved. Resolution of financing problems relates to the type of construction required and the time for construction.

The construction companies have been directly involved, for over three years, in issues relating both to the construction and financing of the new separation project. The construction companies request the opportunity to address the issues Allen Park raises in its petition. Because of the construction companies' familiarity with the history of the litigation and the practical considerations governing the construction and financing of the sewer separation project, it is respectfully submitted that they can provide this Court with relevant information.

WHEREFORE, the construction companies request permission to file the following brief amicus curiae.

Respectfully submitted,

HYMAN, GURWIN, NACHMAN,
FRIEDMAN & WINKELMAN



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INTEREST OF AMICUS

The construction companies[1] were low bidders on contracts to construct segments of a sewer separation project in the City of Allen Park, Michigan. Petitioner, Allen Park, asserts the District Judge improperly refused to recuse himself in the case here which challenges the percentage of costs Allen Park is to pay for the project.

In a related predecessor suit, State of Michigan v City of Allen Park, 501 F Supp 1007 (ED Mich 1980), aff'd 667 F2d 1028 (CA6 1981), cert. denied, 72 L Ed 2d 443 (1982, the construction companies were plaintiffs with the State of Michigan and the Administrator of the United States Environmental Protection Agency. In the related predecessor suit, the Sixth Circuit stated that the district court

> ". . . held that the failure by Allen Park timely to complete the sewer separation project . . .

---

[1] These companies are Greenfield Construction Company, Inc., Lanzo Construction Company, Inc., Giannetti Construction of Michigan, Inc., and Rocco Ferrera & Company, Inc.

> violated the applicable National Pollution Discharge Elimination System (NPDES) permit issued by the State of Michigan. The Court entered an order requiring Allen Park to proceed immediately with the financing and construction of its segment of the project." October 8, 1981 Order (No. 80-1554, CA6).

Amicus in this brief comments on the recusal argument of Allen Park and also reviews the project history documenting years of delay in abating a serious pollution and health problem.

SUMMARY OF ARGUMENT

Allen Park's motion for recusal was properly denied. There has been no abuse of discretion here.

Other communities have paid for and built their portion of the total pollution abatement project. Allen Park's refusal to pay its share of project costs, results in the continuing discharge of raw, sanitary sewage and undermines the effectiveness of the part of the project already built.

ARGUMENT

A Recusal Was Properly Denied

Judge Feikens denied Allen Park's 28 USC 455(a) recusal motion. Two grounds were asserted in support of the motion. First, Allen Park argues the trial judge was biased because of the following statement made about Mr. Moon, one of the counsel for the drainage district:

> "THE COURT: I am satisfied, looking back at the role that you [Mr. Moon] did have, and I am satisfied that no matter what the situation was, if you didn't think I could properly act you would have advised me, notwithstanding whatever the result of that would have been." (A 79)

Citing Roberts v Bailar, 625 F2d 125 (CA6 1980), Allen Park urged Judge Feikens to recuse himself pursuant to 28 USC 455(a), which states:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Judge Feikens distinquished Roberts, a discrimination case, noting that there the trial

judge commented that a principal witness, the judge knew, would not discriminate. Here, Judge Feikens noted his comment was a general comment about counsel, not about a witness (A 82, 96). Judge Feikens also noted that in the then pending proceeding he was reviewing the apportionment record as an appellate court and not deciding credibility (A 91). Roberts was inapplicable.

Allen Park also urged recusal because the trial judge wrote a letter (A 39-40) to citizens of Allen Park. Those citizens had complained about the court's decision to order the pollution abatement project to go forward, allegedly without holding any hearings. The letter set forth a chronology of events obtained ex parte from Mr. Tiplady, one of the drainage district's counsel (A 62-63).

The letter is merely a response to citizen inquiry. The chronology of events obtained from Mr. Tiplady was to save the Judge the time of going through the voluminous testimony (A 94), in order to inform the citizens that

hearings were held before the court's decision.

The letter's final paragraph states:

> "What is important to note is that until recently the City of Allen Park, its officials and citizens have been actively working to obtain separation of the combined sewer system with a sanitary retention basin." (A 39)

The above statement merely accurately reflects the findings made by the district court in its published opinion in the pollution abatement case. See 501 F Supp, at 1009-1010 and 1017 n 10.

The court quoted part of the legislative history of P.L. 93-512, 28 USC 455 et seq. (A 92-93), in justification of denying the recusal motion. The part of the legislative history quoted bears repeating here, as it is applicable to this case:

> "While the proposed legislation would remove the 'duty to sit' concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.
>
> "At the same time, in

> assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of the litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.
>
> "Finally, while the proposed legislation would adopt an objective test, it is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disquality was an abuse of sound judicial discretion." 3 U.S. Cong. & Adm. News, at 6355 (93rd Cong., 2d Sess., 1974) (Emphasis in original.)

There has been no abuse of discretion here. Numerous cases have upheld denial of recusal motions on far more compelling facts. See, e.g., Bradley v Milliken, 620 F2d 1143, 1156-1157 (CA6 1980) (ex parte contracts);

Schultz v Newsweek, 668 F2d 911, 919 (CA6 1982) (defendant's news article favorable to judge); In Re International Business Machines Corp, 618 F2d 923, 927-932 (CA2 1980) (child-like innocence not required, sporadic flare-ups toward counsel); United States v Phillips, 664 F2d 971, 1000-1004 (CA5 1981) (ex parte contacts); Matter of Georgia Paneling Supply, Inc, 581 F2d 520, 522 (CA5 1978) (ex parte conference); In Re United States, 666 F2d 690, 695 (CA1 1981) (prior relationship between judge and defendant); United States v Coven, 662 F2d 162, 168 (CA2 1981) (knowledge of evidence from prior proceeding); Ma v Community Bank, 686 F2d 459, 472 (CA7 1982) (judge lived in Depere, Wis. same town as bank's attorney and knew the bank attorney had practiced law a considerable time); Huff v Standard Life Ins. Co., 683 F2d 1363, 1369-1370 (CA11 1982) (judge's previous affiliation with defendant's law firm no abuse of discretion); In Re Federal Skywalk Cases, 680 F2d 1175, 1183-1184 (CA8 1982) (ex parte telephone calls to

counsel asking if his client would serve as class representative, if a class was certified. Claim of bias must be evaluated in light of the full record and not an isolated incident)

B A Decade Of Severe Pollution Caused By The Discharge Of Raw Sanitary Sewage, In Part, From Allen Park's Combined Sewer System

The history of the pollution of the Ecorse Creek is a long one, plagued by delay in abating the pollution despite agreement by all involved that the discharge of raw sanitary sewage must be controlled.

In May 1969, the Michigan Water Resources Commission (WRC) studied the water quality problems of the Ecorse River together with a plan of correction. The study found that during wet weather, flows in the combined sewer system of the communities involved (including Allen Park) were high. As a result, untreated domestic sanitary sewage and storm-water runoff are discharged into the North and South Branches of the Ecorse Creek at various outlets, 501 F Supp, at 1009. The WRC study

confirmed in detail that the discharge of combined sewer overflows into the river was the prime cause of its "severely degraded condition," id. The specific pollutants are described by the trial court based on the expert testimony of witnesses Canale (University of Michigan Professor of Environmental Studies) and Michigan Department of Natural Resources (MDNR) experts Kilmer, Willson and Sprow. The pollutants found included fecal coliform, organisms associated with the human digestive tract, and also associated with waterborn diseases such as hepatitis and typhoid, id.

In November 1970, as a result of the WRC study, the MDNR ordered the communities within the Ecorse Creek Basin (including Allen Park) to correct pollution emptying into the Ecorse Creek and the Detroit River. As a result, defendant Charles N. Youngblood, the Wayne County Drain Commissioner, authorized a study of the combined sewer systems of the communities involved to find a solution to

the water quality problems. The ultimate result was the "Facility Planning Study: Pollution Abatement of Ecorse Creek, Element 2 -- Combined Sewer Areas, Final Plan (Wayne County Drain Commissioner, February 1977," Id.

C The Facility Plan, Alternative 1 -- A Means To Control The Pollution Is Approved By Allen Park, MDNR And EPA

The Facility Plan was required pursuant to federal regulation in order to qualify any project selected for federal grant aid under Title II of the Clean Water Act (CWA), Section 201, 33 USC 1281 et seq. The regulations[2] detail the contents of the Facility Plan (40 CFR 35.917-1), including an adequate assessment of the expected environmental impact. Public participation is required (40 CFR 35.917-5). A public hearing on the Plan was held on January 27, 1977, id.

Acceptance of the Facility Plan by implementing government units is specifically

---

[2] 40 CFR 35.917 et seq. (1977).

required:

> "A facilities plan submitted for approval shall include adopted resolutions . . . of the implementing governmental units . . . providing for acceptance of the plan . . . ." 40 CFR 35.917-6.

Allen Park passed the required resolution on June 14, 1977, Id., at 1010. As the trial court noted, prior to passing this resolution, Allen Park had several times already formally expressed its approval of the Facilities Plan Alternative 1, id., at 1017 n 10. Alternative 1 of the Facilities Plan called for the cities of Allen Park, Lincoln Park and Taylor to construct a new system of sewers to separate domestic sanitary sewage from storm runoff, id., at 1009.

The regulations also required approval of the Facility Plan by both the United States Environmental Protection Agency (EPA) and MDNR, 40 CFR 35.917-7 and 40 CFR 35.917-8. The approvals were given and EPA and MDNR tendered Step III grants for federal and state financial assistance to implement the necessary construction program, id., at 1011.

The Facility Plan examined three alternatives on the basis of monetary cost, contribution to water quality goals, public acceptability, environmental impact and implementation capability, id., at 1009. Alternative 1 called for Allen Park, Lincoln Park and Taylor to construct a new system of sewers to separate domestic sanitary sewage from storm runoff. This alternative would provide for continuous treatment of domestic sanitary sewage at the Wayne County Wyandotte Wastewater Treatment Plant during all flow conditions and release only storm surface runoff to Ecorse Creek id. The other two alternatives examined are described by the trial court, id.

The Facility Plan recommended selection of Alternative 1. It was selected by the North Branch of Ecorse Creek Drain Improvement after a public hearing on January 27, 1977, id. Allen Park endorsed Alternative, id., at 1017 n 10.

On June 14, 1977 the City of Allen Park Council passed a resolution, id., approving

the financing of drain improvements and authorizing a petition to the Wayne County Drain Commissioner requesting drainage improvements pursuant to Chapter 20 of the Michigan Drain Code of 1956, as amended, Michigan Compiled Laws (MCL) 280.461 et seq. After petitions submitted by the cities of Allen Park, Dearborn Heights, Lincoln Park and Taylor, the County of Wayne and State of Michigan, and following statutory notice and public hearings, MCL 280.467, a Final Order of Determination was entered on October 19, 1977. This Order determined that the petition for a drainage project (referred to as the Ecorse Creek Pollution Abatement Drain No. 1) was sufficient and that the project was necessary for the public health and should be constructed, id. Allen Park, the other communities and the drain commissioner had taken the steps necessary under both federal and state law to implement the project selected in the Facility Plan.

D Allen Park"s Refusal To Pay Its Share Of Project Costs To Implement Alternative 1 Results In NPDES Permit Violation

Pursuant to CWA §202, 33 USC 1281 et seq., the EPA and MDNR tendered Step III grants for federal and state financial assistance to implement the required construction program, id., at 1011. The EPA was to provide 75% of the funding of the grant-eligibity portions of the project and MDNR was to provde 5% of such funding. The remaining 20% of the cost was to be allocated among the local units of government which had originally petitioned for the pollution abatement project -- Allen Park, Lincoln Park, Taylor and Dearborn Heights, id. Following statutory notice and a hearing on April 26, 1978, the drainage board for the Ecorse Creek Pollution Abatement Drain No. 1 confirmed a proposed apportionment of costs, id. An assessment roll was prepared which set Allen Park's apportionment cost at 52.9105% of the total local share amount of $20,040,981.76 to be assessed to

the cities, State and County, id. The drainage district board divided the construction project into 13 construction contracts for work in the four communities involved and advertised them for competitive bidding. Bids were received on all 13 contracts and opened on June 27, 1978, id.

The bids for the project were higher than the drainage board had originally estimated. In July 1978, based on the higher bids, Allen Park raised objections to the project. The other communities raised no objections. In August 1978, Allen Park filed suit against the drainage district for the Ecorse Creek Pollution Abatement Drain No. 1, the Drain Commissioner and Treasurer of Wayne County and the County of Wayne, in Wayne County, Michigan Circuit Court, seeking an injunction against the project, id. The objections raised in the suit were solely financial. No NEPA suit was filed. No attempt was made to exhaust state or federal administrative remedies as to the Facility

Plan or the NPDES Permit. This State court case settled when the parties, upon approval by the MDNR and EPA, agreed to divide the project into two segments, id.

Segment I of the divided project consists of Contracts 6, 7, 8, 9, 10, 11 and 12 and covers sewer separation and storm water control in the Cities of Taylor, Dearborn Heights and Lincoln Park, Michigan. Segment II consists of Contracts 1, 2, 3, 4, 5 and 13, and covers sewer separation, sanitary retention facilities and pumping facilities for the City of Allen Park, id. Segment II was the subject matter of the predecessor pollution abatement litigation. Pursuant to the state court suit settlement agreement, the drainage district awarded only Contract 6-11 and readvertised Contract 12, id. Federal and state grants were received for Segment I and work on that segment was substantially complete at the time of the court's opinion, November 1980, id.

Approval by the MDNR and EPA of the

segmentation was specifically conditioned upon the commitment of defendant Charles N. Youngblood, Wayne County Drain Commissioner, and the LeBlanc Tile Drainage District to complete Segment II by March 31, 1982, id. If Allen Park now succeeds in blocking construction of Segment II, the effectiveness of Segment I will be subverted. The EPA, MDNR and other communities have detrimentally relied on Allen Park's earlier endorsement of the project, id., at 1018.

On December 12, 1979, the pollution abatement litigation was commenced to compel Allen Park to pay its share of the project costs and to compel the project to be built as approved in 1977 by Allen Park, the EPA and MDNR, id., at 1012.

On July 1, 1980, a Final Order and Judgment was filed, id., at 1024, directing Allen Park to forthwith participate in the funding and construction of Alternative 1 pollution abatement project. On November 6, 1980, the trial court issued its Opinion,

concluding:

> "Because of Allen Park's refusal to proceed with financing its segment of the project, plaintiffs are entitled to injunctive relief compelling financing and construction of the Allen Park segment of the Element 2 Final Plan, a project determined necessary for the public

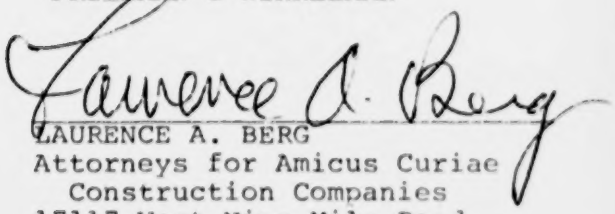
Clearly, the present apportionment case and this petition are pursued to further delay a project Allen Park demanded on June 14, 1977. Id., at 1010.

CONCLUSION

For the foregoing reasons, this court should deny petition for certiorari.

Respectfully submitted,

HYMAN, GURWIN, NACHMAN,
FRIEDMAN & WINKELMAN



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Dated: April 21, 1983

CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

I, LAURENCE A. BERG, being first duly sworn, certify that on April __, 1983 forty (40) copies of Motion For Leave To File And Brief For Amicus Curiae Construction Companies In Support Of Respondents were mailed by first-class mail, postage prepaid, to the Clerk of the United States Supreme Court, No. 1 First Street, N.E., Washington, D.C. 20543. The motions and briefs are submitted pursuant to Rule 36, Supreme Court Rules, within the time permitted by the Rules. I further certify that on April __, 1983 three (3) copies of the Motion For Leave To File And Brief For Amicus Curiae Construction Companies In Support Of Respondents were mailed by first-class mail, postage prepaid, to each of the following counsel of record at the addresses indicated:

Kenneth D. Kruse, Esq.
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Charles R. Moon, Esq.
Dickinson, Wright, Moon,
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Detroit, Michigan 48226

I further certify that all parties required to be served have been served.

_____
LAURENCE A. BERG

Subscribed and sworn to before me
this ___ day of April, 1983.

_____
Marjorie M. Helmling, Notary Public
Livingston County, Michigan
(Acting in Oakland)
My Commission Expires: 12/10/85